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Union Security Agreements under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in Beck

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ARTICLE

UNION SECURITY AGREEMENTS UNDER THE NATIONAL LABOR RELATIONS ACT: THE STATUTE, THE CONSTITUTION, AND THE COURT'S OPINION IN *BECK*

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The Supreme Court's recent decision in Communications Workers of America v. Beck *interpreted section 8(a)(3) of the National Labor Relations Act (NLRA) to prohibit the observance of agency shop agreements. By interpreting the statute in this way, the Court avoided the question of whether union security agreements under the NLRA are subject to constitutional scrutiny. The Court's determination that section 8(a)(3) does not allow agency shop agreements was an important decision affecting the enforceability of union security agreements in the vast majority of private sector bargaining agreements.*

In this Article, Professor Dau-Schmidt criticizes the Court's interpretation of section 8(a)(3) in Beck. *The Article examines the Court's NLRA precedents and the legislative history of the NLRA's section 8(a)(3). Several methods of statutory construction and constitutional adjudication are analyzed. Finally, Professor Dau-Schmidt argues that union security agreements under the NLRA are not subject to constitutional scrutiny because there is no state action in their negotiation or observance.*

In its recent opinion, *Communications Workers of America v. Beck*,[1] the Supreme Court announced the governing principle for determining the extent to which union security agreements[2] may be observed under the National Labor Relations Act (NLRA).[3] In *Beck*, the Court faced the questions of whether

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[1] ____ U.S. ____, 108 S. Ct. 2641 (1988).

[2] A "union security agreement" is an agreement between a union and an employer that the employer will require all employees to undertake a specified level of support for the union as a condition of employment. R. GORMAN, LABOR LAW 639 (1976). *See infra* notes 32–36 and accompanying text.

[3] 29 U.S.C. §§ 141–87 (1982).

section 8(a)(3) of the NLRA[4] allowed a union and an employer to negotiate and observe an agency shop agreement,[5] and if so, whether such agreements violated dissenting employees' first amendment rights.[6] In answering these questions, the Court found that Congress's sole purpose in allowing union security agreements under section 8(a)(3) was to ensure that workers who shared in the benefits of collective bargaining also shared in the costs of that bargaining.[7] Based on this perception of congressional purpose, the Court concluded that section 8(a)(3) allows unions to compel contributions from dissenting employees only to the extent that the union expenditures are "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive [bargaining] representative."[8] The Court's resolution of the statutory issue obviated the need to answer the constitutional question.

The Court's opinion in *Beck* has potentially far-reaching implications. The NLRA is the nation's basic labor statute cov-

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[4] The pertinent portions of § 8(a)(3) read as follows:

> (a) It shall be an unfair labor practice for an employer—. . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in [the NLRA], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in section [9(a) of the NLRA], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section [9(e) of the NLRA] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]

29 U.S.C. § 158(a)(3) (1982).

[5] An "agency shop" is a form of union security agreement in which the employer agrees to require all employees to begin making agency fee payments to the union within a specified period of time after accepting employment, and to continue such payments for the term of their employment. Traditionally the agency fees required under an agency shop agreement are equal to union dues. R. GORMAN, *supra* note 2, at 642.

[6] *Beck*, 108 S. Ct. at 2645.

[7] *Id.* at 2650 (citing Radio Officers v. NLRB, 347 U.S. 17, 41, 74 (1974)).

[8] *Id.* at 2652 (citing Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 447–48 (1984)).

ering virtually the entire private sector. Although section 14(b) of the NLRA allows states to proscribe union security agreements,[9] thirty states, comprising two-thirds of the United States's population, have elected not to do so.[10] In those states over ninety percent of collective bargaining agreements,[11] covering over six million workers, include union security agreements.[12] The Court's decision in *Beck* limits the enforceability of all of these agreements. Although the number of employees who will dissent from full agency shop payments will probably be small,[13] and the reduction in fees that will accompany such dissension will be small for most unions,[14] the bookkeeping and litigation expenses required to resolve the complaints of dissenters may prove a significant drain on the resources of the American labor movement.[15]

The Court's opinion in *Beck* also promises to be controversial. The Court failed to interpret section 8(a)(3) by direct examination of the statute's words, administrative interpretations, or legislative history. Instead, the majority announced an identity

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[9] Section 14(b) of the NLRA provides that "[n]othing in [the NLRA] shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law." 29 U.S.C. § 164(b) (1982).

[10] AFL-CIO, ECONOMIC COMPARISONS BETWEEN OPEN SHOP STATES AND FREE COLLECTIVE BARGAINING STATES 1 (1986).

[11] 2 Collective Bargaining Negot. & Cont. (BNA) 87:1 (July 1986).

[12] BUREAU OF LABOR STATISTICS, MAJOR COLLECTIVE BARGAINING SETTLEMENTS IN PRIVATE INDUSTRY, 1988 1 (Jan. 1989). By comparison, the Supreme Court's opinion in International Ass'n of Machinists v. Street, 367 U.S. 740 (1961), holding that agency shop agreements could not be fully observed under the Railway Labor Act, affected only about one million workers, many of whom were not unionized. *See* BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS 17 (Jan. 1962). This argument first appeared approximately in this form in the petition for writ of certiorari in *Beck*.

[13] If the experience of private sector unions with voluntary programs to refund the portion of union dues spent on political expenditures is any indication, the number of dissenting employees may be very small indeed. Such a refund program has been in effect for several years at United Auto Workers, and in a typical year dissenting duespayers number only about 100 (approximately 0.01% of their membership). B. TAYLOR & F. WITNEY, LABOR RELATIONS LAW 389 (5th ed. 1987).

[14] Under the *Ellis* formula made applicable to NLRA unions by *Beck*, *see infra* note 69 and accompanying text, the largest expenditures that a union cannot charge dissenting employees are expenditures for organizing and political activities. These expenditures have been estimated at 15% and 5% respectively for the average private sector union. Henkel & Wood, *Limitations on the Uses of Union Shop Funds After* Ellis*: What Activities are "Germane" to Collective Bargaining?* 35 LAB. L.J. 736 (1984); B. TAYLOR & F. WITNEY, *supra* note 13, at 388–89.

[15] *See* Brief of the AFL-CIO at 25, *Beck*, 108 S. Ct. 2641. The *Beck* decision also provides an opportunity for employers to harass the trade union movement through employer organizations ostensibly organized to protect the interests of individual employees. *See infra* note 55.

between section 8(a)(3) of the NLRA and section 2 Eleventh of the Railway Labor Act (RLA), and found that its prior opinion, that section 2 Eleventh allowed the observance of union security agreements only for the recoupment of collective bargaining expenses, was controlling in its interpretation of section 8(a)(3).[16] The Court then battled mightily to make the legislative history of the NLRA fit this limited interpretation of section 8(a)(3).[17] The Court's task was not eased by its earlier failure, when interpreting section 2 Eleventh, to consider the legislative history of section 8(a)(3).[18] This omission is inconsistent with the Court's new-found identity between the two sections, since section 8(a)(3) was passed four years before the passage of section 2 Eleventh. Finally, it should be noted that the Court's earlier interpretation of section 2 Eleventh has itself been criticized as inconsistent with the language of the RLA[19] and affected by the Court's desire to avoid the question of whether agency shop agreements under the RLA violate dissenting employees' first amendment rights.[20]

In this Article, I argue that the Court's interpretation of section 8(a)(3) of the NLRA in *Beck* cannot be supported by direct examination of the statute's words, administrative interpretations, or legislative history. Such a direct examination of the usual intrinsic and extrinsic evidence for statutory interpretation suggests that in enacting section 8(a)(3), Congress intended to allow the full observance of agency shop agreements and rec-

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[16] *Beck*, 108 S. Ct. at 2648–49. The relevant language of section 2 Eleventh of the RLA reads as follows:

> Notwithstanding any other provisions of [the RLA], or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—a) to make agreements, requiring, as a condition of continued employment, that . . . all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership . . . .

45 U.S.C. § 152 Eleventh (1982).

[17] *Beck*, 108 S. Ct. at 2649–57.

[18] *See* International Ass'n of Machinists v. Street, 367 U.S. 740 (1961).

[19] *See* Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 445–46 (1984).

[20] *See id.*; NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979); Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977); *Street*, 367 U.S. at 749; Cantor, *Uses and Abuses of the Agency Shop*, 59 NOTRE DAME L. REV. 61, 65–72 (1983).

ognized purposes for union security agreements beyond the mere recoupment of collective bargaining expenses. The Court's interpretation of section 8(a)(3) deviates from Congress's intent because it relies on the Court's prior interpretation of section 2 Eleventh of the RLA and on that interpretation's constitutionally colored view of the purpose and extent of union security agreements allowed under the RLA.[21] The Court's reliance on its prior interpretation of section 2 Eleventh in interpreting section 8(a)(3) amounts to an application of the doctrine of avoiding constitutional questions.[22] Because the *Beck* Court failed to acknowledge or consider the effect of its past constitutional concerns on its interpretation of section 2 Eleventh,[23] it never considered whether imposing this interpretation on section 8(a)(3) was an appropriate application of this doctrine.

I also argue that the Court's interpretation of section 8(a)(3) in *Beck* is an inappropriate application of the doctrine of avoiding constitutional questions. The negotiation and observance of agency shop agreements under the NLRA raises no serious constitutional question to avoid. Under the Court's recent precedents, there is no plausible argument that the actions of a union and a private employer in negotiating and observing such agreements represent state action subject to constitutional scrutiny. Moreover, the Court's interpretation in *Beck* is not supported by the rationales typically given for the doctrine of avoiding constitutional questions. One rationale is that the Court should presume that Congress avoids constitutional controversy in its enactments.[24] The words and legislative history of the NLRA suggest that, in enacting that statute, Congress consciously raised a host of constitutional questions including whether union security agreements infringe dissenting employees' first amendment rights. Another rationale is that the Court should avoid constitutional questions to minimize its encroachment on the powers of the elected legislature.[25] The Court's interpretation of section 8(a)(3) actively encroaches on the domain of the

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[21] *See Beck*, 108 S. Ct. at 2648 (citing *Street*, 367 U.S. 740).

[22] The doctrine holds that where a "serious question" of a statute's constitutionality has been raised, the Court should, if possible, "fairly" construe the statute to avoid the constitutional question. Crowell v. Benson, 285 U.S. 22, 62 (1935).

[23] *Beck*, 108 S. Ct. at 2657.

[24] W. ESKRIDGE & P. FRICKEY, LEGISLATION, STATUTES, AND THE CREATION OF PUBLIC POLICY 676 (1988).

[25] Ashwander v. TVA, 297 U.S. 288, 346–48 (1935) (Brandeis, J., concurring); Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815 (1983).

legislature by specifying both the policy and the form of the statute. Both rationales suggest that, even where application of the doctrine is appropriate, the Court should undertake the minimum deviation from legislative intent necessary to avoid the constitutional question. However, the Court's opinion in *Beck* ignores an alternative interpretation of section 9(a) of the NLRA[26] that would allow the negotiation of agency shop agreements, but would avoid constitutional objections by removing the negotiation of employee fees for non-collective bargaining expenses from the exclusive province of the union.[27]

Finally, I examine the question, avoided in *Beck*, of whether the negotiation and observance of union security agreements under section 8(a)(3) are subject to constitutional constraints. This question is of continuing importance, since the Court will probably soon be asked to decide whether the procedural protections of dissenting employees' rights it has found constitutionally required in the public sector[28] apply to employees governed by the NLRA. I find that under the current precedents of the Court there is insufficient state action in the negotiation and observance of union security agreements under the NLRA to support constitutional objections. There is insufficient grant of authority in the designation of the union as the exclusive bargaining representative to make the union a state actor. Moreover, it is a fundamental tenet of American labor law that the government regulates only the process of collective bargaining, leaving the determination of the actual provisions of collective agreement to the parties.[29] Thus, there is insufficient state en-

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[26] 29 U.S.C. § 159(a) (1982).

[27] As discussed below, the designation of the union as the exclusive representative of the employees under section 9(a) is the primary argument for state action in the negotiation and observance of union security agreements. Such state action is a prerequisite for dissenting employees' constitutional objections to agency fees for expenses unrelated to collective bargaining. *See infra* text accompanying notes 310–313, 373–380.

[28] Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).

[29] One of [the] fundamental policies [of the NLRA] is freedom of contract. While the parties' freedom . . . is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (citations omitted). "[T]he Wagner Act became law on the floodtide of the belief that the conflicting interests of management and worker can be adjusted only by private negotiation, backed, if necessary, by economic weapons, without the intervention of law." Cox, *The Right To Engage In Concerted Activities*, 26 IND. L.J. 319, 322 (1951). "The basic philosophy of the Wagner Act was that labor problems would be resolved by a private process of negotiation and contracting, backed up by the threat or use of self-help measures to secure bargaining

couragement of the negotiation of union security agreements to designate observance of such agreements as state action. The fact that the government, in hopes of achieving certain public policies, has fostered a particular system of private negotiation—collective bargaining through elected exclusive representatives—does not change the private nature of these negotiations or their results. The government commonly fosters certain private institutions, for example private corporations, in hopes that these institutions will benefit their participants. To extend constitutional scrutiny to the negotiation and observance of union security agreements made by private unions and private employers under the NLRA would undermine the individual liberty the state action requirement is designed to protect[30] and extend judicial power beyond the bounds circumscribed for it in our Constitution.[31]

I. *COMMUNICATIONS WORKERS OF AMERICA V. BECK*: A LACK OF UNION SECURITY IN STATUTORY RIGHTS

A. *The Prelude to* Beck

A union security agreement is an agreement between a union and an employer that the employer will require all employees to undertake some specified level of union support as a condition of employment.[32] Such agreements can take several forms. If the union and the employer negotiate a "closed shop" agreement, the employer agrees to require union membership and the payment of union dues as a condition of both gaining and retaining employment. Under such an agreement, the employer may hire only union members and must require all employees to maintain their union membership and pay union dues.[33] Under

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advantage." Klare, *The Public-Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1390 (1982).

[30] [I]f the Constitution is used to restrict private conduct, its role will be transformed. Rather than retaining its position as the protector of liberty, it will become for many, if not all, a vehicle of regulation and annoyance as the populace is forced continually to look over its collective shoulder in fear that its actions might be in contravention of the judiciary's demarcation of another's constitutional rights.

Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action"*, 80 NW. U.L. REV. 558, 569–70 (1985).

[31] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-2 (2d ed. 1988).

[32] R. GORMAN, *supra* note 2, at 639–41.

[33] *Id.* at 641–42.

a "union shop" agreement, the employer may hire without regard to union membership, but agrees to require all employees to join the union and begin paying union dues within a specified period of time after being hired.[34] An "agency shop" agreement is similar to a union shop agreement, except that the employees are only required to pay dues to the union. Whether the employees actually join the union is left to their discretion.[35] Finally, if the union and employer agree to a "maintenance of membership" agreement, the employer agrees that, if any employees join the union during the term of their employment, the employer will require that they continue their membership and pay dues as a condition of employment.[36] As discussed below, the closed shop is now largely of only historical significance.[37]

For the vast majority of employees in the private sector, the legality of union security agreements is governed by section 8(a)(3) of the NLRA and by state law.[38] Section 8(a)(3) was first enacted in 1935 as section 8(3) of the Wagner Act.[39] At that time, Congress enacted the general prohibition of section 8(a)(3), which forbids employers from "encourag[ing] or discourag[ing] membership in any labor organization" "by discrimination in regard to hire or tenure of employment or any term or condition of employment."[40] By itself, this general prohibition would forbid union security agreements. However, to preserve the negotiation and observance of union security agreements, Congress added the following proviso:

> *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . if such labor organization is the representative of the employ-

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] In the Taft-Hartley Act, Congress outlawed the closed shop. *See infra* notes 46, 243 and accompanying text. The Supreme Court has also interpreted the second proviso of section 8(a)(3) to prohibit enforcement or observance of the membership requirement of a union shop agreement. NLRB v. General Motors Corp., 373 U.S. 734 (1963). *See infra* notes 154–156 and accompanying text.

[38] Section 8(a)(3) allows certain forms of union security agreements for employees governed by the NLRA. 29 U.S.C. § 158(a)(3) (1982). However, section 14(b) allows state laws prohibiting union security agreements to supersede section 8(a)(3)'s authorization. 29 U.S.C. § 164(b) (1982). For the text of NLRA section 14(b), *see supra* note 9.

[39] National Labor Relations Act § 8(3), ch. 372, Pub. L. No. 198, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151–69 (1982)).

[40] 29 U.S.C. § 158(a)(3) (1982).

> ees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, ...[41]

Section 159(a) referred to in the proviso is now section 9(a) of the NLRA. It specifies that a union elected by a majority of the employees is the "exclusive representative" of those employees with the right and obligation to represent all of the employees fairly, including non-members, in negotiating and enforcing a collective agreement.[42]

In the Taft-Hartley Act of 1947,[43] Congress relettered section 8(3) as section 8(a)(3)[44] and placed additional limitations on union security agreements. Congress limited the existing proviso by specifying that union security agreements could not require union membership as a condition of employment until "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ."[45] By limiting union membership to a post-condition of employment, Congress outlawed the closed shop.[46] Congress imposed further limitations by adding a second proviso to section 8(a)(3):

> *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .[47]

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[41] *Id.*

[42] "Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit . . . shall be the exclusive representatives of all the employees in such unit . . . ." 29 U.S.C. § 159(a) (1982); *see also* Steele v. Louisville & N. R.R., 323 U.S. 192 (1944) (union, as exclusive representative, has duty to represent all employees fairly in negotiation and enforcement of the collective agreement); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (precedent of *Steele* under RLA applied to section 9(a) of the NLRA).

[43] Labor Management Relations Act, ch. 120, § 101, 61 Stat. 136, 140 (1947) (amending 29 U.S.C. § 158(3) (1946), now codified at 29 U.S.C. § 158(a)(3) (1982)).

[44] Congress relettered section 8(3) because it created a new subsection, 8(b), specifying prohibited or "unfair" labor practices for unions. 29 U.S.C. § 158(b) (1982).

[45] 29 U.S.C. § 158(a)(3) (1982).

[46] *Beck*, 108 S. Ct. at 2649–50.

[47] 29 U.S.C. § 158(a)(3) (1982).

This proviso seeks to limit union discretion under union security agreements to the enforcement of the obligation to pay dues. Finally, Congress enacted sections 8(b)(2) and 14(b) of the NLRA. Section 8(b)(2) prohibits a union from causing or attempting to cause an employer to discriminate against an employee in violation of section 8(a)(3).[48]Section 14(b) states that nothing in the NLRA, including section 8(a)(3), pre-empts state laws prohibiting union security agreements.[49] Section 14(b) was included merely to clarify the pre-emption question since, even under the Wagner Act, the pre-emption of state laws prohibiting union security agreements was not intended.[50]

For employees in the railroad and airline industries, the legality of union security agreements is governed by section 2 Eleventh of the RLA.[51] Under this Act, union security agreements were unlawful until 1951.[52] At that time Congress amended section 2 Eleventh so that it is now very similar to section 8(a)(3) of the NLRA, except that section 2 Eleventh explicitly pre-empts contrary state laws.[53] Indeed, the legislative history of the 1951 amendments suggests that Congress intended to allow the same sort of union security agreements under section 2 Eleventh as it had permitted under section 8(a)(3) of the NLRA.[54]

The statutory constructions of both section 8(a)(3) and section 2 Eleventh sparked disputes between nonunion employees and their employers. The resentment of these dissenting employees over mandatory payments to support unions they opposed, and the ready access to the litigation resources of employer-dominated "right-to-work" organizations,[55] inevitably led to litigation to determine the extent and constitutionality of union security

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[48] 29 U.S.C. § 158(b)(2) (1982).
[49] 29 U.S.C. § 164(b) (1982).
[50] *See infra* note 217.
[51] 45 U.S.C. § 152 Eleventh (1982).
[52] *Beck*, 108 S. Ct. at 2665 (Blackmun, J., dissenting).
[53] For the text of RLA section 2 Eleventh, *see supra* note 16.
[54] *Beck*, 108 S. Ct. at 2649 (citing various sections of NLRA legislative history).
[55] Almost all of the major union security litigation under the RLA and the NLRA has been supported by the National Right to Work Legal Defense and Education Foundation. Wright, *Clipping the Political Wings of Unions: An Examination of Existing Law and Proposals for Change*, 5 HARV. J.L. & PUB. POL'Y 1, 34 n.203 (1982). The National Right to Work Legal Defense and Education Foundation was founded, and is largely supported, by employer interests. UAW v. National Right to Work Legal Defense & Educ. Found., Inc., 781 F.2d 928, 929, 934 (D.C. Cir. 1986); *see also* UAW v. National Right to Work Legal Defense & Educ. Found., Inc., 590 F.2d 1139 (D.C. Cir. 1978).

agreements allowed under section 8(a)(3) and section 2 Eleventh. The test came first under section 2 Eleventh of the RLA.

In *Railway Employer's Department v. Hanson*[56] the Supreme Court faced the question of whether a union shop agreement under section 2 Eleventh of the RLA violated dissenting employees' first amendment freedom of association and fifth amendment "liberty" to work. The parties did not dispute, nor did the Court question, whether a union shop was allowed by section 2 Eleventh. Although the Court recognized that section 2 Eleventh did not compel the parties to agree to a union shop, it found the prerequisite state action to support the constitutional claims in the section's pre-emption of an applicable state constitutional provision prohibiting union shop agreements.[57] Because of this pre-emption, the Court viewed "the federal statute [as] the source of . . . power and authority by which [the employees'] private rights are lost or sacrificed."[58] However, no violation of the employees' first or fifth amendment rights was found. Rather, the Court found that trade unions and their support strengthen the liberty to work.[59] Moreover, it held that with respect to the periodic dues and fees allowed by the RLA, any infringement of first amendment rights was justified by the state's compelling interest in promoting collective bargaining and industrial peace.[60] The Court specifically reserved the question of whether the imposition of "other conditions . . . or . . . the exaction of dues . . . as a cover for forcing ideological

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[56] 351 U.S. 225 (1956).

[57] The Court in passing alluded to several theories for state action including Smith v. Allwright, 321 U.S. 649 (1944), and Steele v. Louisville & N. R.R., 323 U.S. 192 (1944). The mention of *Smith* perhaps suggests that because under the RLA the government once prohibited union security, the withdrawal of this prohibition made union security agreements state action. Read, *Minority Rights and the Union Shop: A Basis for Constitutional Attack*, 49 MINN. L. REV. 227, 243 (1964). *Steele* suggests that the union's designation as the exclusive representative under section 9(a) of the NLRA makes it a state actor. The Court, in dicta, also expressed its opinion that if a court were to enforce a union security agreement, a valid state action claim would arise. Railway Employees Dep't v. Hanson, 351 U.S. 225, 232 n.4 (1956) (citing Shelley v. Kraemer, 334 U.S. 1 (1948)). However, the basis of the Court's holding of state action in *Hanson* is the exercise of the Supremacy Clause. *Hanson*, 351 U.S. at 232; Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 YALE L.J. 345, 355–56 (1961).

[58] *Hanson*, 351 U.S. at 232.

[59] *Id.* at 235.

[60] *Id.* at 238. The Court's opinion is ambiguous as to whether it found no infringement of dissenters' first amendment rights or whether it found such infringement justified. The later interpretation of *Hanson* was adopted by the Court in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977).

conformity or other action . . ." would be a violation of dissenters' first amendment rights.[61]

Five years later, the Court determined that the very question it had reserved in *Hanson* was raised by the facts in *International Association of Machinists v. Street*.[62] In *Street*, dissenting employees had challenged the constitutionality of an agency shop agreement negotiated under section 2 Eleventh.[63] The trial court found that, in fact, the union had spent a portion of the money it had collected in dues on political activities.[64] Again, neither party disputed the legality of the agency shop agreement under section 2 Eleventh.[65] However, after citing the doctrine of "fairly" construing statutes to avoid serious questions of constitutionality, the Supreme Court held that it did not have to answer the constitutional question. It interpreted section 2 Eleventh to allow the compulsion of dues for collective bargaining purposes, but not for political purposes.[66] To support this conclusion, the Court argued that the legislative history of the 1951 revisions to the RLA showed that Congress's purpose in allowing union security agreements under the RLA was to allow unions to recoup the expenses of their obligations under the RLA in negotiating and enforcing the collective agreement.[67] Thus, dissenters could not be compelled to fund political activities. The Court concluded that this was not only a "fair" but a "reasonable" interpretation of section 2 Eleventh, implying that it could have reached this interpretation without resort to the doctrine of construing statutes to avoid constitutional questions.[68] The holding in *Street* was further refined in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*,[69] where the Court interpreted section 2 Eleventh to allow the compulsion of dues only to cover expenses "necessarily or reasonably"

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[61] *Hanson*, 351 U.S. at 238.
[62] 367 U.S. 740 (1961).
[63] *Id.* at 743–44.
[64] *Id.* at 744–45.
[65] *Id.* at 803 (Frankfurter, J., dissenting).
[66] *Id.* at 749–50.
[67] *Id.* at 764.
[68] *Id.* at 750; *but see id.* at 786 (Black, J., dissenting) ("Yet no one has suggested that the Court's statutory construction of § 2 Eleventh could possibly be supported without the crutch of its fear of unconstitutionality."). "In order to avoid the constitutional issue assumed to be lurking in *Street*, Justice Brennan's opinion tortured the legislative history to find a congressional limitation on the use of union security for political purposes." Cantor, *supra* note 20, at 72.
[69] 466 U.S. 435 (1984).

incurred by the union in the performance of its collective bargaining duties under the Act.[70]

A test of the constitutionality of the negotiation and observance of agency shop agreements next arose in the public sector in *Abood v. Detroit Board of Education*.[71] In *Abood*, the legality of union security agreements for state employees was governed by a state statute modeled after both section 8(a)(3) and section 2 Eleventh.[72] The Court could not avoid the constitutional question because it was bound by a state court interpretation that the statute allowed the negotiation and observance of agency shop agreements.[73] Because the employer in the case was a state government, there was no question that the negotiation and observance of the agency shop agreement constituted state action. The Court held that the negotiation and enforcement of an agency shop agreement infringed dissenting employees' first amendment rights. The majority reasoned that although this infringement was justified with respect to collective bargaining expenses by the state's interest in promoting collective bargaining,[74] it could not be justified with respect to expenses for political activities.[75] Thus, the Court held that where there is state action in the negotiation and observance of a union security agreement, the agency shop violates dissenters' first amendment rights.

B. Communications Workers of America v. Beck

The test of the extent of union security agreements allowed under section 8(a)(3) of the NLRA finally arose in *Communications Workers of America v. Beck*.[76] Plaintiffs, twenty dis-

[70] *Id.* at 448.
[71] 431 U.S. 209 (1976).
[72] *Id.* at 223–24.
[73] *Id.* at 211, 214–15.
[74] *Id.* at 225–26.
[75] *Id.* at 235–36.
[76] 108 S. Ct. 2641 (1988). There is a reason why the test of section 8(a)(3) came after that of section 2 Eleventh. Under the NLRA, primary jurisdiction for the enforcement and interpretation of section 8(a)(3) lies with the National Labor Relations Board. 29 U.S.C. § 160(a) (1982). The Board has consistently given a broad interpretation of the extent of union security agreements allowed under section 8(a)(3). *See infra* notes 169–188 and accompanying text. Thus, the Board has not prosecuted cases to test the limits of section 8(a)(3). There is no corresponding administrative agency under the RLA to restrict individual tests of particular sections of the Act. The plaintiffs in *Beck* escaped the primary jurisdiction of the Board by alleging a violation of the duty of fair representation and of the Constitution, raising the interpretation of section 8(a)(3) as a collateral issue. 108 S. Ct. at 2647. The Supreme Court failed to discuss substantively either the duty of fair representation or the constitutional claim in its opinion in *Beck*.

senting employees, objected to an agency shop agreement that required them to pay agency fees equal to periodic union dues.[77] It was undisputed that a portion of the dues and agency fees collected by the union had been used for political purposes.[78] The plaintiffs argued that the agency shop agreement violated section 8(a)(3) of the NLRA, or in the alternative, that the agreement violated their first amendment rights and that section 8(a)(3) was therefore unconstitutional.[79]

The parties' briefs before the Supreme Court suggest four major areas of contention.[80] First, the parties disputed the relevance of the Supreme Court's interpretations of section 2 Eleventh in *Street* and *Ellis*.[81] The plaintiffs argued that the Court's RLA precedents should govern the interpretation of section 8(a)(3) because of the similarity in the language of the two sections and the legislative history of section 2 Eleventh, which suggested that Congress intended it to have the same scope as section 8(a)(3).[82] The union attempted to distinguish the RLA precedents, arguing that the RLA had a different legislative history[83] and that the Court's interpretations of section 2 Eleventh were colored by its attempt to avoid constitutional questions that do not arise under the NLRA.[84]

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[77] 108 S. Ct. at 2645. The plaintiffs' cause was supported and financed by the National Right to Work Legal Defense and Education Foundation. *See* Brief for the AFL-CIO at 24, *Beck*, 108 S. Ct. 2641. Many interested parties filed *amicus* briefs before the Supreme Court. The AFL-CIO filed a brief supporting the Communications Workers of America, as did Solicitor General Charles Fried, who was joined by NLRB General Counsel Rosemary Collyer. The Landmark Legal Foundation, the Pacific Legal Foundation (joined by a group of dissident Screen Actors Guild members including Charlton Heston, Claude Akins, and Rory Calhoun), and a group of four Senators (Jessie Helms (R-N.C.), Strom Thurmond (R-S.C.), Dan Quayle (R-Ind.), and Steven Symms (R-Idaho)) filed briefs supporting plaintiffs.

[78] *Beck*, 108 S. Ct. at 2645.

[79] *Id.* at 2645–46. The plaintiffs also argued that the negotiation and enforcement of an agency shop agreement by the union violated the union's duty of fair representation, and that if the NLRA allowed the agency shop, it violated the plaintiffs' fifth as well as first amendment rights. Brief for Respondents at 29–44. However, these arguments were not addressed by the Supreme Court and are beyond the scope of this Article.

[80] Not all of these arguments were raised before the district and circuit courts, but they are presented at this point to facilitate exposition. For a summary of the oral presentation of these arguments before the Supreme Court, see 56 U.S.L.W. 3475 (Jan. 19, 1988).

[81] *See supra* notes 62–70 and accompanying text.

[82] Brief for Respondents at 23–27.

[83] The union argued that the history of the NLRA was one of first allowing all union security agreements and then prohibiting only the worst abuses, while the history of the RLA was one of first prohibiting all union security and then allowing only limited union security. Thus, the union argued that the legislative histories of the two acts with respect to union security are diametrically opposed. Brief for Petitioners at 41–42.

[84] *Id.* at 40–41. The constitutional question which the Court avoided in its RLA cases

Second, the parties differed in their interpretations of the plain language of section 8(a)(3). The plaintiffs argued that the definitions of "labor organization" and "exclusive representative" in the NLRA limited the purpose of unions under the statute to collective bargaining.[85] Because section 8(a)(3) allows only exclusive representatives to negotiate union security agreements, the plaintiffs reasoned that the section limited the "dues" which the representative could compel to those necessary to cover collective bargaining expenses.[86] The union disputed whether the NLRA limited union purposes to collective bargaining and argued that the plain language of section 8(a)(3) allows unions to charge all employees "uniform dues" on pain of loss of their jobs.[87]

Third, the parties had different interpretations of the legislative history of section 8(a)(3). The plaintiffs contended that Congress's purpose in allowing union security agreements under section 8(a)(3) was to prevent "free-riding" by nonunion employees who benefitted from collective bargaining but did not share its cost.[88] Accordingly, they argued that the only fees allowed in union security agreements under section 8(a)(3)

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was whether an agency shop agreement between a private union as exclusive representative and a private employer violates dissenting employees' first amendment rights. International Ass'n of Machinists v. Street, 367 U.S. 740 (1961). Although a similar constitutional question was raised in *Beck*, the union argued that *Beck* did not pose the same constitutional concern as the RLA cases because it did not share the basis for the finding of state action in the RLA cases. The basis for finding state action in the RLA union security cases was the exercise of the Supremacy Clause by Congress in pre-empting state legislation which prohibited union security agreements. Railway Employees' Dep't v. Hanson, 351 U.S. 225, 232 (1956). There is no such pre-emption under the NLRA. *See* 29 U.S.C. § 164(b) (1982).

[85] Brief for Respondents at 19–20. Section 2(5) of the NLRA defines a "labor organization" as

> . . . any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (1982). Section 9(a) of the NLRA gives the following "definition" of "exclusive representative:"

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

29 U.S.C. § 159(a) (1982).

[86] Brief for Respondents at 18.

[87] Brief for Petitioners at 21–23.

[88] Brief for Respondents at 21.

would be payments for collective bargaining services.[89] The union countered that, prior to the Taft-Hartley amendments, all forms of union security agreements had been legal; and in enacting the amendments, Congress had intended to prohibit only the worst abuses of union security—the closed shop and union discrimination in membership. Thus, Congress did not intend to intrude into the internal affairs of unions or to place restrictions on the use of union funds.[90]

Finally, the parties disputed whether there was sufficient state action to support the plaintiffs' constitutional claim. The plaintiffs argued that the state action prerequisite was met by the union's designation as the exclusive bargaining representative under section 9(a).[91] They quoted dicta from *Steele v. Louisville & Nashville Railroad Co.*[92] suggesting that because the Union, as exclusive representative, is "clothed with power not unlike that of a legislature" it may be a state actor and subject to constitutional scrutiny.[93] The plaintiffs also argued that the designation of the union as the exclusive representative under the NLRA encourages the negotiation of agency shop agreements because it prevents individual employees from negotiating employment contracts without such agreements, and it requires the employer to negotiate such agreements in good faith.[94] The union maintained that its designation as the exclusive bargaining representative did not make it a state actor since the Supreme Court had recently established that governmental grants of mo-

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[89] *Id.* at 17.

[90] Brief for Petitioners at 38–39.

[91] Brief for Respondents at 5.

[92] 323 U.S. 192 (1944).

[93] Brief for Respondents at 11. The quote from *Steele* is as follows:

> For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights. If the Railway Labor Act purports to impose on . . . [the nonunion employees] the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the . . . [union's] own members, we must decide the constitutional questions, which . . . [the nonunion member] raises . . . .

323 U.S. 192, 198–99. *See also id.* at 208 (Murphy, J., concurring). Although *Steele* is a RLA case, the Court has found a similar duty of fair representation under the NLRA, Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), and considers the reasoning of *Steele* equally applicable to NLRA-governed unions.

[94] 29 U.S.C. § 158(a)(5) (1982); Brief for Respondents at 5, *Beck*, 108 S. Ct. 2641. The Supreme Court established that union security agreements are a mandatory subject of bargaining under section 8(a)(5) of the NLRA in NLRB v. General Motors Corp., 373 U.S. 734 (1963).

nopoly status to private institutions in the provision of services did not make those institutions state actors.[95] The union saw no government encouragement of union security agreements since section 8(a)(3) does not require, but merely permits, such agreements.[96] The union closed its argument by noting that the Supreme Court had previously rejected the notion that a union's designation as the exclusive bargaining representative made its actions state action.[97]

The district court, acting *sua sponte*, granted partial summary judgment to the plaintiffs. Without ruling on the legality of the agency shop under the NLRA, the trial court found that "collect[ing] from the plaintiffs amounts beyond that allocable to collective bargaining . . . violates the First Amendment rights of the plaintiffs."[98] On appeal, a divided panel for the Fourth Circuit affirmed the district court's decision regarding the union's liability.[99] Based on the Supreme Court's interpretation of section 2 Eleventh, the majority held that section 8(a)(3) did not allow the compulsion of fees for purposes unrelated to collective bargaining.[100] The majority also stated in dicta that such collection would violate the employees' first amendment rights.[101] The Fourth Circuit granted the union's request for

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[95] Brief for Petitioners at 17–18, *Beck*, 108 S. Ct. 2641 (citing San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522 (1987); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1975)).

[96] Brief for Petitioners at 13–15, *Beck*, 108 S. Ct. 2641.

[97] *Id.* at 18–19 (citing United Steelworkers v. Sadlowski, 457 U.S. 102, 122 n.16 (1982) ("union rule precluding candidates for union office from accepting campaign contributions from nonmembers 'does not involve state action'"); United Steelworkers v. Weber, 443 U.S. 193, 200 (1979) ("collectively bargained affirmative action plan 'does not involve state action'" (dicta)).

[98] Beck v. Communications Workers of Am., 468 F. Supp. 93, 97 (D. Md. 1979), *aff'd in part*, 776 F.2d 1187 (4th Cir. 1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 108 S. Ct. 2641 (1988). The court ordered the union to return to the plaintiffs all dues for expenses other than "collective bargaining, contract administration and grievance adjustment" since January 1, 1976, and to institute a record-keeping system to segregate expenses for collective bargaining and non-collective bargaining purposes. *Id.* The district court appointed a special master who determined the percent of the union's expenditures allocable to collective bargaining since the beginning of 1976. *Beck*, 776 F.2d at 1191–92.

[99] However, the court, unclear about the standard used by the appointed special master in the district court, held that the "preponderance of evidence" standard, rather than the "clear and convincing" standard, should have been applied to the union's burden of showing that expenses were related to collective bargaining. The case was remanded for further proceedings. *Beck*, 776 F.2d at 1212.

[100] *Id.* at 1201–02. The majority also held that the union's negotiation and enforcement of an agency shop agreement violated its duty of fair representation. *Id.* at 1203.

[101] *Id.* at 1205.

rehearing *en banc*[102] and, by a six to four majority, affirmed the panel majority's disposition of the case.[103] Because the Fourth Circuit's opinion in *Beck* directly conflicted with the Second Circuit's opinion in *Price v. United Auto Workers*,[104] the Supreme Court granted certiorari to resolve the conflict.[105]

The Supreme Court affirmed the judgment of the Fourth Circuit Court of Appeals, holding that section 8(a)(3) of the NLRA did not allow the compulsion of dues for purposes unrelated to collective bargaining.[106] The majority held that the Court's prior interpretation of section 2 Eleventh, announced in *International Association of Machinists v. Street*,[107] was controlling with respect to the interpretation of section 8(a)(3).[108] They described the two provisions as "identical" in "all material respects" and noted that the legislative history of section 2 Eleventh suggests that Congress intended to model it after section 8(a)(3).[109] Based on this identity, the majority imposed on section 8(a)(3) the same narrow purpose for union security agreements the Court had found under section 2 Eleventh in *Street*. They asserted that the "nearly identical language [of the two sections] reflects the fact that, in both, Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-negotiated benefits contribute to their cost."[110] The majority concluded that "in these circumstances, we think it clear that Congress intended the same language to have the same meaning in both statutes."[111]

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[102] Beck v. Communications Workers of Am., 800 F.2d 1280 (4th Cir. 1986), *aff'd*, 108 S. Ct. 2641 (1988).

[103] The *en banc* opinion of the court gives little insight into the rationale of the Fourth Circuit in disallowing agency shop payments. The arguments of the parties at the *en banc* hearing focused primarily on whether the NLRB or the federal courts had primary jurisdiction over the case. *Id.* at 1282. This was probably due to the fact that the panel majority erroneously cited RLA cases as authority for jurisdiction even though no such jurisdictional issue arises under the RLA. *Beck*, 108 S. Ct. at 2647. As a result, the *en banc* opinions are expressed in terms of the judges' beliefs regarding the court's jurisdiction, rather than in terms of the merit of the questions at hand. The *per curiam* opinion indicated that five judges found federal jurisdiction over the plaintiffs' claims under both section 8(a)(3) and the duty of fair representation, while one judge found jurisdiction only over the plaintiffs' duty of fair representation claim alone. *Beck*, 800 F.2d at 1282. The opinion indicated that all six of these judges had voted to affirm "the majority panel opinion's disposition of the allocation issue." *Id.*

[104] 795 F.2d 1128 (2d Cir. 1986).

[105] Communications Workers of Am. v. Beck, 482 U.S. 904 (1987) (mem.).

[106] *Beck*, 108 S. Ct. at 2657.

[107] 367 U.S. 740 (1961).

[108] 108 S. Ct. at 2648.

[109] *Id.* at 2648–49.

[110] *Id.* at 2649.

[111] *Id.*

The Court attempted to support its narrow interpretation of the purpose of union security agreements under section 8(a)(3) by referring to the legislative history of the NLRA. The majority argued that during the enactment of the Taft-Hartley amendments, Congress was not only concerned that the closed shop "create[d] too great a barrier to free employment," but was "equally concerned . . . that without such agreements, many employees would reap the benefits that unions negotiated on their behalf without . . . contributing financial support to those efforts."[112] They concluded that these dual purposes, one for limiting union security and one for allowing the continuation of some form of union security, were both represented in section 8(a)(3).[113]

The Court gave a very expansive reading of the Congress's purpose in limiting union security agreements under section 8(a)(3). The union's argument that in enacting section 8(a)(3) Congress sought only to prohibit the worst abuses of union security under the Wagner Act was rejected. Instead, the majority maintained that in 1947 "Congress viewed the Wagner Act's regime of compulsory unionism as seriously flawed,"[114] and did not "set out . . . simply to tinker in some limited fashion with the [Act's] authorization of union-security agreements."[115] According to the majority, Congress retained union security to the extent that it did only because "such agreements promoted stability [in labor relations] by eliminating 'free-riders.'"[116] To strengthen their argument, the majority resorted to the unusual practice of quoting a minority report on the Taft-Hartley Act. The report asserted that the Act allowed "union-shop agreement[s] only under limited and administratively burdensome conditions."[117]

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[112] *Id.* at 2649–50 (quoting S. REP. NO. 105, 80th Cong., 1st Sess. 6 (1947) [hereinafter S. REP. NO. 105], *reprinted in* 1 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 407, 412 (1974) [hereinafter LMRA LEGISLATIVE HISTORY]).

[113] *Id.* at 2650.

[114] *Id.* at 2653.

[115] *Id.* at 2653–54 (quoting S. REP. NO. 105, *supra* note 112, at 7, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 413).

[116] *Id.*

[117] *Id.* at 2653 (quoting S. REP. NO. 105, Pt. 2, 80th Cong., 1st Sess. 8, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 463, 470 (Minority Report)). This practice seems ill-advised given the natural tendency of opponents to exaggerate the purpose and effect of a bill in seeking its demise. For example, opponents of the Wagner Act alleged that it repealed the thirteenth amendment, creating labor despots and czars. *Hearings Before the Senate Comm. on Education and Labor*, 73d Cong., 2d Sess. 965–66 (1934) [hereinafter *1934 Senate Hearings*], *reprinted in* 1 LEGISLATIVE HISTORY OF

The Court limited the purpose of union security under section 8(a)(3) to merely the recoupment of collective bargaining expenses. The majority did this by reference to the analogy between section 8(a)(3) and section 2 Eleventh. They insisted that the same concern over free-riders that had caused Congress to retain limited union security under section 8(a)(3) had also prompted it to enact section 2 Eleventh.[118] The union's argument, that the different legislative histories of the two sections required that they be interpreted differently, was rejected on the basis of the legislative history of section 2 Eleventh, which suggested that it was to allow the same union security provisions as section 8(a)(3).[119] The union's assertion that the Court's interpretations of section 2 Eleventh had been constitutionally colored was likewise dismissed. The Court maintained, as it had in *Street*, that its interpretation of section 2 Eleventh was "not only 'fairly possible' but entirely reasonable" and thus not distorted by constitutional concerns.[120]

The Court's interpretation of section 8(a)(3) obviated the need to answer the constitutional question. However, in passing the majority made an interesting attribution on the issue of whether the exercise of rights permitted by section 8(a)(3) involves state action. They cited as analogous the holdings in *Steelworkers v. Sadlowski*[121] and *Steelworkers v. Weber*,[122] the cases cited by the union as supporting its argument that there is no state action.[123] Without noting that the relevant language in *Weber* is dicta, the majority attributed to that case the holding that "negotiation of [a] collective bargaining agreement's affirmative action plan does not involve state action."[124] This attribution would seem to defeat any arguments that a union's actions in negoti-

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THE NATIONAL LABOR RELATIONS ACT 27, 1003–04 (1959) [hereinafter NLRA LEGISLATIVE HISTORY]. Opponents of the Taft-Hartley Act alleged that it would once again allow "yellow dog" contracts between an employer and his employees, restraining them from joining a union during the term of their employment. 93 CONG. REC. 6672 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1565, 1588–89 (comments of Sen. Pepper (D-Fla.)). Moreover, since it is the majority of the legislature who enact the law, the opinion of the minority as to its purpose and effect is, arguably, irrelevant.

[118] *Beck*, 108 S. Ct. at 2653.

[119] *Id.* at 2654.

[120] *Id.* at 2657 (citing International Ass'n of Machinists v. Street, 367 U.S. 740, 750 (1961)).

[121] 457 U.S. 102 (1982).

[122] 443 U.S. 193 (1979).

[123] *Id.* at 2656–57 (citing United Steelworkers v. Sadlowski, 457 U.S. 102 (1982); United Steelworkers v. Weber, 443 U.S. 193 (1979)).

[124] *Id.* at 2657.

ating and observing a union security agreement are state actions by virtue of the union's designation as the exclusive bargaining representative under section 9(a) of the NLRA.

Justice Blackmun, joined by Justices O'Connor and Scalia, dissented from the Court's interpretation of section 8(a)(3). Blackmun stated that he was unable to join the majority's opinion because he was "unwilling to offend our established doctrines of statutory construction and strain the meaning of the language used by Congress in section 8(a)(3), simply to conform section 8(a)(3)'s construction to the Court's interpretation of similar language in a different later-enacted statute . . . ."[125] He further commented that the interpretation of section 2 Eleventh was itself "not without its difficulties."[126] In criticizing the majority's decision, Blackmun first argued that the plain language of section 8(a)(3) allowed the agency shop, that this had been the consistent interpretation of the statute by the National Labor Relations Board (NLRB), and that the Court had previously approved agency shop agreements.[127] Second, he asserted that the legislative history of the NLRA showed that Congress's purpose in limiting union security under the Taft-Hartley amendments to section 8(a)(3) was to proscribe only the most serious abuses of union security—the closed shop and union discrimination in membership and employment.[128] He urged that the legislative history did not support the majority's conclusion that Congress's "single minded" purpose in continuing to allow union security under section 8(a)(3) was to prevent free-riders.[129] To Blackmun, nothing in the legislative history suggested that Congress intended to outlaw the agency shop or limit the dues that can be collected from dissenting employees.[130] Finally, Blackmun had no problem with interpreting section 8(a)(3) differently from section 2 Eleventh, since he saw these statutes as born of different concerns with different legislative histories.[131] Rather, he reasoned that even if Congress intended in 1951 to enact section 8(a)(3) into the RLA by enacting section 2 Eleventh, the events of 1951 were irrelevant to the determination of what

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[125] *Id.* at 2658 (Blackmun, J., dissenting) (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977)).
[126] *Id.*
[127] *Id.* at 2659.
[128] *Id.* at 2661.
[129] *Id.* at 2664.
[130] *Id.* at 2661–62.
[131] *Id.* at 2664–65.

Congress enacted in section 8(a)(3) in 1947.[132] For Blackmun, "[t]he relevant sources for gleaning the 1947 Congress' intent are the plain language of section 8(a)(3), and . . . the legislative history of section 8(a)(3)."[133]

II. An Interpretation of Section 8(a)(3) of the NLRA by Direct Examination of Its Words, Administrative Interpretations, and Legislative History

The Supreme Court's interpretation of section 8(a)(3) in *Beck* does not follow the usual rules of statutory construction. The canons of construction require that a court first examine the "plain meaning" of the words of the statute,[134] and then, if the meaning is ambiguous, the administrative interpretations and legislative history.[135] The *Beck* Court referred to the words of section 8(a)(3) only to note its similarity to section 2 Eleventh of the RLA.[136] The Court ignored the NLRB's *amicus curiae* position that section 8(a)(3) allows agency shop agreements.[137] It alluded to the Board's prior opinions on section 8(a)(3) only to note some errant language which, by the Court's own admission, deviated from the Board's other interpretations of section 8(a)(3).[138] The majority examined the legislative history of section 8(a)(3) only to corroborate its imposition of the RLA precedents rather than to make a direct determination of the section's meaning.[139] Instead of undertaking a direct examination of the words, administrative interpretations, and legislative history of section 8(a)(3), the Court identified section 8(a)(3) with section 2 Eleventh and then imposed on section 8(a)(3) its previous interpretations of section 2 Eleventh.[140] Thus, the Court bypassed the traditional starting points for statutory construc-

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[132] *Id.* at 2665–66.

[133] *Id.* at 2666.

[134] Caminetti v. United States, 242 U.S. 470 (1916) (a court should first look to the plain meaning of the statutory language); *see also* 2A N. Singer, Sutherland Statutory Construction § 46.01 (4th ed. 1984).

[135] Posner, *supra* note 25, at 807–08; *Ex parte* Collett, 337 U.S. 55, 61 (1949) (extrinsic aids, such as legislative history, are used only when the statute is unclear); *see also* 2A N. Singer, *supra* note 134, § 48.01.

[136] *Beck*, 108 S. Ct. at 2648–49.

[137] Brief for the United States at 12–19, 23, *Beck*, 108 S. Ct. 2641.

[138] *Beck*, 108 S. Ct. at 2652 n.7.

[139] *Id.* at 2649–50.

[140] *Id.* at 2648–49.

tion in favor of the more remote canon of interpreting similar statutory provisions the same.[141]

One need not subscribe to the belief that the canons of construction provide a determinative formula for the discovery of the "true" meaning of a statute to object to the Court's analysis in *Beck*.[142] Almost all critics of the canons of construction have argued that a statute's words and legislative history are the best evidence to examine in discerning a meaning grounded in the intent of the legislature.[143] Some commentators have also argued that, regardless of the canons of construction, administrative interpretations merit deference by the courts where the relevant agency has special expertise in the subject area or where experience in the statute's enactment has given the agency special insight into the legislature's intent.[144] Deference by the courts to the intent of the elected legislature is, of course, a fundamental premise of our democratic government.[145]

It would not be impossible to derive an interpretation of a statute which fairly represented the intent of the legislature by interpreting the statute identically to a previous interpretation of a similar statute without direct examination of the statute's words, administrative interpretations, or legislative history. Presumably the similar language of the two statutes should convey the same meaning to the court and represent the same legislative purposes in their enactment. Moreover, if the similarity of the statutes was recognized when the court first considered their meaning, the court might legitimately consider the words, administrative interpretations, and legislative history of both statutes in its initial interpretation. There may even be some policy

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[141] For a discussion of this canon, see 2A N. SINGER, *supra* note 134, § 51.02.

[142] This myth was of course "debunked" long ago by Karl Llewellyn. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950).

[143] R. DWORKIN, LAW'S EMPIRE 313–54 (1986) (statutory interpretation is part of an ongoing process of creating new and evolving meaning from the text of the statute, in which the court should read that text in light of the political history of the statute); H. Hart & A. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1156–57 (tent. ed. 1957) (in interpreting a statute, a court should examine the statute's words and history to determine legislative purpose); Posner, *supra* note 25, at 817–18 (in interpreting a statute, a court should look at its words, history, and the values of the enacting legislature to reconstruct how the enacting legislators would have wanted the statute applied to the case at bar); *but see* J. CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM 123–24 (1982) (the meaning of a statute cannot be determined out of context, but because context knows no bounds of description, interpretation is utterly subjective).

[144] *See, e.g.*, Posner, *supra* note 25, at 811.

[145] *See, e.g.*, Hatch, *Modern* Marbury *Myths*, 57 U. CIN. L. REV. 891, 893–94 (1989).

reason expressed or implied by Congress as to why the statutes should be interpreted similarly, regardless of extrinsic evidence to the contrary. However, by imposing its previous interpretation of a similar statute without direct examination of the words, administrative interpretations, and legislative history of the statute in question, a court ignores the best evidence of congressional intent in favor of assumptions and evidence concerning a different statute.

In this Part, I undertake a direct examination of section 8(a)(3)'s words, administrative interpretations, and legislative history to determine Congress's purposes in allowing union security agreements under the NLRA and to determine whether Congress intended to allow the observance of agency shop agreements under section 8(a)(3). The results of this examination can be used to verify whether the Court's circuitous route of statutory interpretation in *Beck* has led to a fair interpretation of Congress's intent.

A. *The Words of the Statute*

Under the canons of construction, the usual starting point for statutory interpretation is the plain meaning of the words of the statute. If the words of the statute are unambiguous, the court ends its inquiry and adopts their plain meaning as its interpretation of the statute.[146] Even divorced from the rhetoric of the canons of construction, the words of the statute are of course the primary intrinsic evidence of congressional intent in the interpretation of a statute.[147]

On its face, the language of section 8(a)(3) of the NLRA permits the negotiation of union security agreements that require all employees to pay dues and initiation fees equal to those of union members.[148] The first proviso of the section allows employers and the unions designated as exclusive bargaining representatives to enter into union security agreements which require all employees to become members of the union as a post-condition of employment.[149] The second proviso prevents the employer from discharging an employee covered by the union

[146] Caminetti v. United States, 242 U.S. 470, 485 (1916).

[147] *See generally* W. ESKRIDGE & P. FRICKEY, *supra* note 24, at 639–46; Posner, *supra* note 25, at 807–08.

[148] 29 U.S.C. § 158(a)(3) (1982).

[149] *See supra* text accompanying note 41.

security agreement if ". . . [union] membership was not available to the employee on the same terms and conditions generally applicable to other members . . ." or if the employee is denied membership for any reason other than "the failure . . . to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."[150] There is no ambiguity that the dues and fees that can be charged are equal to full membership dues and fees. By adding the word "uniformly" to the proviso, Congress emphasized that all employees are to be charged the same dues and fees.[151] Nothing in the language of section 8(a)(3) suggests that there is any difference between the dues that can be charged dissenting and non-dissenting employees, or that there are any limitations on the union expenses that can be included in these dues and fees.

The only ambiguity in this plain reading of section 8(a)(3) concerns the exact form of union security agreement allowed by the section. The first proviso, in allowing union security agreements requiring membership as a post-condition of employment, defines a union shop agreement.[152] The second proviso, in stating that union security agreements can be enforced only to the extent of requiring the payment of uniform dues, defines an agency shop agreement.[153] This conflict was resolved by the Supreme Court in *NLRB v. General Motors Corp.*,[154] where the Court held that "membership," as used in section 8(a)(3) after the Taft-Hartley amendments, consists only of the obligation to pay dues.[155] Agency shop obligations thus became the "practical equivalent" of membership obligations for the purposes of section 8(a)(3).[156] With the resolution of this question in favor of the agency shop, the language of section 8(a)(3) unambiguously allows employers and unions to negotiate and observe agency shop agreements that require all employees, as

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[150] *See supra* text accompanying note 47.

[151] *Id.*

[152] *See supra* text accompanying note 34.

[153] *See supra* text accompanying note 35.

[154] 373 U.S. 734 (1963).

[155] *Id.* at 742. In *General Motors*, the employer refused to bargain with the union over an agency shop agreement, arguing that because the agency shop does not require membership, it was not allowed under the first proviso of section 8(a)(3). *Id.* The Court held that the Taft-Hartley amendments to the NLRA had "whittled" the term "membership" down to its "financial core" of merely the obligation to pay dues. *Id.* Accordingly, the Court ordered the employer to bargain with the union over the agency shop agreement. *Id.* at 744–45.

[156] *Id.* at 743.

a condition of employment, to pay dues and fees equal to those paid by union members.

The plaintiffs' argument in *Beck* with respect to the plain language of the statute is unpersuasive. They argued that the language of the NLRA limits the dues that can be charged employees under a union security agreement to collective bargaining expenses because the definitions of "labor organization" and "exclusive representative" are limited to collective bargaining and section 8(a)(3) specifies that only exclusive representatives can negotiate union security agreements.[157] In fact the Act defines a "labor organization" as an organization which exists "*in whole or in part*" for the purposes of collective bargaining.[158] Moreover, in the "findings and declaration of policy" of the NLRA, Congress stated that it is the policy of the United States to "protect . . . the exercise by workers of full freedom of association, self-organization, and designation of representatives . . . for the purpose of negotiating the terms and conditions of their employment *or other mutual aid or protection.*"[159] On its face, the limitation that only an exclusive representative can negotiate a union security agreement appears to strive to ensure the legitimacy of the union and its representation of the majority of employees rather than to limit the type of union security agreement it can negotiate.[160] Finally, both the definitions of "labor organization" and "exclusive representative" and the limitation in section 8(a)(3) were carried forward from the original Wagner Act.[161] Since the Wagner Act allowed all forms of union security, including the closed shop, it does not seem likely that these definitions and limitations were intended to limit the dues and fees a union can charge under a union security agreement.[162]

B. *The Interpretation of the National Labor Relations Board*

Another canon of statutory construction is that courts should give great deference to prior interpretations of the statute by

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[157] Brief for Respondents at 19–20, *Beck*, 108 S. Ct. 2641.

[158] 29 U.S.C. § 152(5) (1982) (emphasis added).

[159] 29 U.S.C. § 151 (1982) (emphasis added).

[160] *Cf.* THE DEVELOPING LABOR LAW 1362 (C. Morris 2d ed. 1983) [hereinafter DEVELOPING LABOR LAW] (Wagner Act authorized union security agreements only for unions which "legitimately represented" the employees).

[161] *See* National Labor Relations Act, ch. 372, §§ 2(5), 8(3), 9(a), 49 Stat. 449, 450, 452–53 (1935) (current version at 29 U.S.C. §§ 152(5), 158(3), 159(a) (1982)).

[162] *See infra* notes 209–219 and accompanying text.

the administrative agency charged with the enforcement of that statute.[163] This is especially true where the agency has special expertise in the subject area, or where the agency's construction was undertaken by people who helped in the enactment of the statute.[164] Judge Posner has criticized this canon, pointing out that an administrative agency's interpretation of a statute may show more fidelity to the views of the current administration than the intent of the enacting Congress.[165] However, even Judge Posner admits that the interpretation of the administrative agency may be a valuable piece of extrinsic evidence of congressional intent where the agency has special knowledge of the subject matter or legislative history.[166] The NLRB was created precisely to provide a body with special expertise in labor relations to enforce the NLRA.[167] Moreover, the opinion of a General Counsel appointed by President Reagan that favors organized labor by arguing that section 8(a)(3) allows the negotiation of agency shop agreements does not seem subject to the criticism of political bias.

As previously mentioned,[168] the Board and the Department of Justice joined in an *amicus curiae* brief in *Beck*, supporting the union's arguments that section 8(a)(3) allowed the negotiation and observance of agency shop agreements.[169] Because of the Board's active support of the union's position, and because the Board's prior interpretations of section 8(a)(3) are fairly straightforward, those interpretations were not a primary matter of dispute between the parties in *Beck*. They do provide insight, however, into the Board's view of the legislative intent behind section 8(a)(3).

The Board has approved the negotiation and observance of agency shop agreements requiring agency fees equal to full union dues under section 8(a)(3) of the NLRA. In *American Seating Co.*,[170] the Board upheld the legality of a union shop agreement which allowed religious objectors to pay an agency

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[163] *See, e.g.*, Chevron v. Natural Resources Defense, 467 U.S. 837, 843 (1984); NLRB v. Hendrick County Rural Elec. Membership Corp., 454 U.S. 170, 177, 178–90 (1981); Udall v. Tallman, 380 U.S. 1, 16 (1965).

[164] *Udall*, 380 U.S. at 16.

[165] Posner, *supra* note 25, at 811.

[166] *Id.*

[167] *See generally* J. GETMAN & B. POGREBIN, LABOR RELATIONS (1988); J. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD (1974).

[168] *See supra* text accompanying note 137.

[169] Brief for the United States at 12–19, 23, *Beck*, 108 S. Ct. 2641.

[170] 98 N.L.R.B. 800 (1952).

fee equal to full union dues in lieu of joining the union.[171] The Board reasoned that such an agreement would have been legal under section 8(3) of the Wagner Act,[172] that the enactment of section 8(a)(3) in the Taft-Hartley amendments added only "qualifications not pertinent here," and that "the legislative history of the amended Act indicates that Congress intended not to illegalize the practice of obtaining support payments from nonunion members who would otherwise be 'free-riders.'"[173]

Similarly, in *General Motors Corp.*,[174] the Board approved the negotiation of a union security agreement which required all employees to pay agency fees equal to full union dues.[175] In upholding the lawfulness of the agency shop agreement under consideration, the Board stated: "[W]e are unable to distinguish, *so far as its legality is concerned*, the instant agency-shop proposal from any other union-security proposal which predicates a right of discharge only upon an employee's failure to tender *the equivalent of regular union dues and initiation fees*."[176] The Board stated that it was "impelled" to such a holding by "the clear intention of the Congress as expressed in Section 8(a)(3) of the Act, in the legislative history of the Wagner and Taft-Hartley Acts, and by the Board and court decisions in which that section has been construed."[177]

Moreover, the Board has specifically held that section 8(a)(3) allows unions to charge non-members and dissenters agency fees equal to full union dues without regard to whether such

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[171] The Board examined the legality of the agreement to determine whether the collective bargaining agreement was valid and could act as a bar to severance of a portion of the bargaining unit by the employer. *Id.* at 801.

[172] *Id.* at 802 (citing Public Service Co. of Colorado, 89 N.L.R.B. 418 (1950)).

[173] *Id.*

[174] 130 N.L.R.B. 481 (1961), *vacated*, 133 N.L.R.B. 451 (1961), *enforcement denied*, 303 F.2d 428 (6th Cir., 1962), *rev'd*, 373 U.S. 734 (1963).

[175] *See supra* notes 154–155 and accompanying text. The Board was asked to decide whether the proviso to section 8(a)(3) allowed only union security agreements requiring "membership," such as the union shop, or whether the employer's duty to bargain extended to the agency shop, a lesser form of union security. *Id.* at 481. The Board initially decided that the proviso did in fact allow only union shop agreements requiring membership. *Id.* at 486, 500. To reach this conclusion the Board had to ignore its precedent under the Wagner Act that section 8(3), the precursor to section 8(a)(3) of the current NLRA, prescribed the maximum union security provisions allowed rather than the minimum. Public Service Co. of Colorado, 89 N.L.R.B. 418 (1950). However, on rehearing after a change in the membership of the Board, the Board followed its precedent under the Wagner Act and upheld the negotiation of the agency shop. General Motors Corp., 133 N.L.R.B. 451, 457 (1961), *enforcement denied*, 303 F.2d 428 (6th Cir. 1962), *rev'd*, 373 U.S. 734 (1963).

[176] General Motors Corp., 133 N.L.R.B. at 459 (original emphasis suppressed, emphasis added).

[177] *Id.* at 457 (citations omitted).

dues are used for collective bargaining or other purposes. In *Detroit Mailers Union No. 40 (Detroit Newspaper Publishers Ass'n)*,[178] the Board rejected arguments that the second proviso of section 8(a)(3) prevented the discharge under a union security agreement of dissenting employees who had tendered a portion of union dues, but who objected to paying the remainder of the dues which had been committed to non-collective bargaining purposes.[179] The Board stated that "[n]either on its face nor in the congressional purpose behind [section 8(a)(3)] can any warrant be found for making any distinction here between dues which may be allocated for collective-bargaining purposes and those earmarked for institutional expenses of the union."[180] Hence, full union dues could be required of dissenting employees under a union security agreement "so long as they are periodic and uniformly required and are not devoted to a purpose which would make their mandatory extraction otherwise inimical to public policy."[181]

The only deviation from this consistent line of rulings upholding the agency shop under section 8(a)(3) came in *Local 959, International Brotherhood of Teamsters*,[182] the Board's opinion cited by the Supreme Court in *Beck*.[183] In *Local 959* the Board stayed the union's attempts to compel payments for a savings and loan program and a building program. The payments were "assessments" which went into separate funds established by the union for a "special purpose," rather than into the union's general funds established to support and maintain the union. According to the Board, these payments did not constitute "periodic dues" within the meaning of section 8(a)(3).[184] The Board supported its finding that the monies were for a "special purpose" by asserting that they would be used "to accomplish ends not encompassed in its duties as a collective-bargaining agent of the employees."[185] The examination of the purpose to which the monies would be spent was justified by arguing that Con-

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[178] 192 N.L.R.B. 951 (1971). *See also* Great Lakes Dist., Seafarers' Int'l Union (Tomlinson Fleet Corp.), 149 N.L.R.B. 1114, 1120 (1964).

[179] The dues were committed to the fraternal purposes of an old age pension and mortuary fund and to maintain a home for aged and infirm printers. *Detroit Mailers*, 192 N.L.R.B. at 951, 956.

[180] *Id.* at 952.

[181] *Id.*

[182] 167 N.L.R.B. 1042 (1967).

[183] *Beck*, 108 S. Ct. at 2652 n.7.

[184] *Local 959*, 167 N.L.R.B. at 1044.

[185] *Id.*

gress's purpose in allowing union security under the NLRA was to prevent non-members from free-riding with respect to collective bargaining expenses.[186] During the course of this argument the Board concluded: "It would thus appear that the right to charge 'periodic dues' granted unions by the proviso to Section 8(a)(3) is concerned exclusively with the concept that those enjoying the benefits of collective bargaining should bear their fair share of the cost incurred by the collective-bargaining agent in representing them."[187]

However, the Board's opinion in *Detroit Mailers* succeeded its opinion in *Local 959* and clearly repudiates any implication that section 8(a)(3) does not allow an agency shop. In *Local 959*, the Board described a congressional purpose for allowing union security agreements under section 8(a)(3) which is inconsistent with allowing agency shop agreements. The narrow holding of the opinion, however, was that the assessments in question were not "periodic dues" within the meaning of section 8(a)(3). The Board in *Detroit Mailers* distinguished its decision in *Local 959* on precisely these grounds, characterizing the case simply as one in which the union treasury never received the collected monies and in which even the union viewed the charges as an assessment rather than periodic dues.[188] Indeed, this may be the only basis on which *Local 959* can be consistently read, since it would seem counterfactual to disallow charges for the construction of union buildings on the grounds that these buildings would not be used for collective bargaining. When actually confronted in *Detroit Mailers* with the question of whether section 8(a)(3) allowed an agency shop agreement, the Board's response was an unequivocal "yes."

C. *The Legislative History of Section 8(a)(3) of the NLRA*

When the words of a statute are ambiguous, courts traditionally refer to legislative history to determine the legislature's intent.[189] The record of a bill's progress through the legislature,

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[186] *Id.* at 1044–45 (quoting Radio Officers' Union v. NLRB, 347 U.S. 17, 41 (1954)).

[187] *Id.* at 1045. This was the language quoted in a footnote by the majority in *Beck*, 108 S. Ct. at 2652 n.7.

[188] Detroit Mailers Union No. 40 (Detroit Newspaper Publishers Ass'n), 192 N.L.R.B. 951, 952 (1971).

[189] Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982); 2A N. SINGER, *supra* note 134, § 48.01.

from committee hearings to final passage, is the best extrinsic evidence of the context in which the words of the statute evolved.[190]

1. The History, Effects, and Objectives of Union Security Agreements

In order to understand the legislative history of the NLRA with respect to union security argreements, it is necessary to understand both the law on union security agreements at the time of the enactment of the Wagner Act and unions' objectives in promoting the negotiation of such agreements.

Since their inception in this country, unions have sought to obtain union security agreements.[191] Under the common law, such agreements initially were held unlawful as being in furtherance of an unlawful conspiracy.[192] Once the courts accepted that unions were not unlawful conspiracies,[193] most jurisdictions held that union security agreements, including the closed, union, and agency shop, were lawful.[194] A few states enacted statutes outlawing specific forms of union security, in particular the closed shop, but most state legislatures remained silent on the subject.[195] The federal government took no role in regulating union security agreements outside of the railway industry prior

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[190] *See* W. ESKRIDGE & P. FRICKEY, *supra* note 24, at 698–99, 709–10, 717–19. Of course, there is a traditional hierarchy of extrinsic evidence in statutory interpretation. Certain sources, such as committee reports or statements by the author, are given greater weight than other sources in the interpretation of the statute. *Id.*, 709, 717, 735.

[191] F. DULLES, LABOR IN AMERICA: A HISTORY 27 (3d ed. 1966).

[192] *See generally* Despres, *The Collective Agreement For The Union Shop*, 7 U. CHI. L. REV. 24, 31–33 (1939); Sayre, *Labor and the Courts*, 39 YALE L.J. 682, 695–97 (1930).

[193] *E.g.*, Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, (1842).

[194] *See, e.g.*, Jacobs v. Cohen, 183 N.Y. 207, 76 N.E. 5 (1905); Parkinson v. Building Trades Council, 154 Cal. 581, 98 P. 1027 (1908); Kemp v. Division 241, Amalgamated Ass'n of Street and Elec. Ry. Employees, 255 Ill. 213, 99 N.E. 389 (1912); Local Branch No. 248, Nat'l Decorators Ass'n v. Solt, 8 Ohio App. 437 (1918); Gasaway v. Borderland Coal Corp., 278 F. 56 (7th Cir. 1921); Ribner v. Rasco Butter & Egg Co., 135 Misc. 616, 238 N.Y.S. 132 (1929); Harper v. Electrical Workers Local 520, 48 S.W.2d 1033 (Tex. Civ. App. 1932); Mississippi Theatres Corp. v. Hattiesburg Local Union No. 615, 174 Miss. 439, 164 So. 887 (1936). *See generally* 1 L. TELLER, THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING § 170 (1940); Despres, *supra* note 192, at 31–44; RESTATEMENT OF CONTRACTS § 515(c), illustration 18 (1932).

[195] In 1939, only five states (California, Colorado, Louisiana, Maryland, and Nevada) had statutes which prohibited compulsory union membership. Despres, *supra* note 192, at 54–55.

to 1935.[196] In 1933 Congress passed the National Industrial Recovery Act (NIRA).[197] Section 7(a) of the NIRA prohibited employer discrimination on the basis of union affiliation.[198] Some courts, apparently contrary to the intent of Congress,[199] interpreted this provision to prohibit the closed shop.[200] Thus, in the early 1930's the legality of union security agreements was governed by state law, with most states allowing union security agreements and a few errant courts striking down closed shop agreements under section 7(a) of the NIRA.

The unions' objectives in seeking union security agreements are evident from an examination of the effects of such agreements. All union security agreements require that, as a condition of employment, employees represented by the union provide support for the union either through membership and financial

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[196] The Railway Labor Act of 1934 prohibited all union security agreements. Railway Labor Act of 1934, § 2 Fourth and Fifth, 48 Stat. 1185, 1187–88. However, the Act's prohibition on union security agreements was as much to prevent their use by the railways in preserving company unions, S. REP. No. 2262, 81st Cong., 2d Sess. 3, *cited in* Railway Employees Dep't. v. Hanson 351 U.S. 225, 231 (1956), as to protect dissenting employees' rights. *1934 Senate Hearings*, *supra* note 117 at 157, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 187; International Ass'n of Machinists v. Street, 367 U.S. 740, 752–53 (1961). In 1951 Congress enacted Section 2 Eleventh of the RLA to allow union security agreements in the railway industry. Act of January 10, 1951, Pub. L. No. 914, 64 Stat. 1238, (now codified at 45 U.S.C. § 152 Eleventh).

[197] National Industrial Recovery Act of 1933, Pub. L. No. 67, 48 Stat. 195. The NIRA was later declared unconstitutional by the Supreme Court in A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[198] Section 7(a) of the National Industrial Recovery Act provided as follows:

> Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other considered activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

National Industrial Recovery Act, § 7(a), 48 Stat. at 198–99.

[199] *Memorandum Comparing S. 1958, 74th Cong., 1st Sess., with Substitute S. 2926, 73d Cong., 2d Sess.* 29 (Mar. 11, 1935), [hereinafter *Comparison Memorandum*], *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1319, 1355.

[200] *See, e.g.*, Fryns v. Fair Lawn Fur Dressing Co., 114 N.J. Eq. 462, 168 A. 862 (Ch. 1933) (closed shop violates NIRA § 7(a) right to join rival union); Bayonne Textile Corp. v. American Fed. of Silk Workers, 114 N.J. Eq. 307, 168 A. 799 (Ch. 1933) (strike for closed shop is illegal), *rev'd*, 116 N.J. Eq. 146, 172 A. 551 (N.J. 1934). *Contra, e.g.*, De Agostina v. Parkshire Ridge Amusements, Inc., 155 Misc. 518, 278 N.Y.S. 622 (Sup. 1935) (closed shop lawful); Farulla v. Ralph A. Freundlich, Inc., 153 Misc. 738, 277 N.Y.S. 47 (Sup. 1934) (same).

contribution, or solely through financial contribution. Since the union determines the conditions of membership, the requirement of membership under a closed or union shop can provide the union with some discretion over the constituency of the employer's work force. Furthermore, the requirements imposed on employees by a closed shop, a union shop, or an agency shop increase the interchangeability of workers with respect to union support, as well as providing a source of financial support and perhaps loyalty for the union. Each effect can be examined separately with respect to its union objectives.

The union's discretion over who is a member and works in a closed or union shop allows the union to achieve a variety of objectives. Although the amount of discretion exercised by unions in excluding workers from membership has varied greatly, historically unions have used the closed or union shop to exclude workers who were careless or poorly trained,[201] who were disloyal to the union,[202] or who violated union rules by failing to pay dues, by undertaking a wildcat strike, or by crossing a picket line.[203] Unfortunately, some unions also used their membership rules to exclude workers on the basis of race, gender, religion, or nationality.[204] The closed shop was also used in some cases to control the supply of labor available to the employer in order to raise wages.[205]

The increase in the interchangeability of workers with respect to union support furthers at least three union objectives. First, the increase in interchangeability decreases the employer's incentive to discriminate on the basis of union affiliation. An employer who operates under a union security agreement has less incentive to fire an employee for union activity, since he knows he will just have to replace that worker with another union supporter. This reduction in employer incentive to discriminate protects both the individual employee's right of association and the integrity of the union as an organization from

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[201] F. DULLES, *supra* note 191, at 27. Union members were particularly concerned that fellow employees undertake their work with the requisite skill and due care to do the job safely during the reign of the "fellow servant" rule prior to the advent of workers' compensation. 79 CONG. REC. 9732 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3231–33 (extension of remarks by Rep. Beiter(D-N.Y.)).

[202] B. TAYLOR & F. WHITNEY, *supra* note 13, at 367–68.

[203] R. GORMAN, *supra* note 2, at.639.

[204] Steele v. Louisville & N. R.R., 323 U.S. 192 (1944); Oliphant v. Brotherhood of Locomotive Firemen, 156 F. Supp. 89 (N.D. Ohio 1957). This practice has since been outlawed by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982).

[205] F. DULLES, *supra* note 191, at 63.

being undermined by the employer. Second, the increase in interchangeability decreases the resentment of workers who voluntarily join the union toward other workers who otherwise would not share the burdens of solidarity. By reducing the resentment of the voluntary union members, the union security agreement removes an irritant and a potential obstacle to solidarity with those who do not join voluntarily. Finally, the increase in interchangeability prevents workers who do not voluntarily join the union from free-riding on the benefits of union representation that cannot be consumed exclusively by union members.[206] Workers who do not join the union voluntarily may in fact value the benefits of union representation very highly, but may not wish to pay for them since they know that other workers will support the union and will obtain the benefits of union representation for them anyway. Such free-riding saps the strength of the union and undercuts its ability to provide union benefits desired by the workers.[207]

Finally, financial support and potential loyalty resulting from union security agreements further several other union objectives. The resources provided by a union security agreement allow the union to do a better job in representing the employees: organizing, lobbying elected officials, supporting strikes, negotiating, and enforcing agreements. By doing a better job, the union can protect itself from being undermined by the employer or by rival unions, and can facilitate the organization of other employees. Also, to the extent that the union does a better job at the expense of the insular interests of the employer, the union security agreement shifts bargaining power from the employer to the employees. Thus, union security agreements provide unions with resources to maintain their activities, to grow, and perhaps to alter the balance of power in the workplace. All of these union objectives in pursuing union security agreements were well known among labor leaders, management representatives, and labor relations experts of the 1930's.[208]

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[206] Such benefits would include benefits which the union must legally provide to all workers in the bargaining unit and public goods such as a safe and healthy workplace or comfortable environment which the union cannot supply to some workers without supplying to all.

[207] In the lexicon of economics, such a free-rider problem would result in the inefficiently low provision of union benefits. M. OLSON, THE LOGIC OF COLLECTIVE ACTION 15–16 (1971); H. VARIAN, INTERMEDIATE MICROECONOMICS 574–76 (1987).

[208] The unions' desire to achieve some control over the constituency of the workplace, whether to ensure safety, to preserve union discipline, to protect the union, or for any of the less venerable reasons, had long been recognized. Despres, *supra* note 192, at

2. The Wagner Act

Against this background, section 8(a)(3) of the NLRA was first enacted in 1935 as section 8(3) of the Wagner Act.[209] As previously stated,[210] this section contained a general prohibition against employer discrimination on the basis of union affiliation and the first proviso, which allowed the negotiation of union security agreements.[211] Neither the limitation on the first proviso—that union membership could not be a pre-condition to employment—nor the limitations of the second proviso were included. Section 8(3) contained only two explicit limitations on the negotiation of union security agreements: that such agreements were to be negotiated by a union designated as the exclusive bargaining representative of the employees under section 9(a) of the Act, and that the union could not be "established, maintained, or assisted" by the employer.[212] Because the first proviso refers only to agreements requiring "membership" as a condition of employment, it was later argued that this proviso did not allow the agency shop.[213] However, the Board and the Supreme Court interpreted section 8(3) of the Wagner Act to allow both the closed shop and all weaker forms of union se-

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28–30. The protection of individual members' right to engage in union activity against employer impingement was perhaps the first purpose of union security agreements. Brooks, *Stability Versus Employee Free Choice*, 61 CORNELL L. REV. 344, 350 (1976). During the nineteenth and early twentieth centuries, union adherents referred to employees who worked in an organized shop but did not join the union as "rats," in reference to their unpleasant and parasitic nature, and sought union security agreements to avoid association and to protect their union from free-riding. Despres, *supra* note 192, at 27–38. Finally, historically both employees and employers understood that a union security agreement could foster the incumbent union and shift bargaining power from the employer to the employees. *Id.* at 28.

[209] National Labor Relations (Wagner) Act, ch. 372, § 8(3), Pub. L. No. 74-198, 49 Stat. 449, 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(3) (1982)).

[210] *See supra* notes 39–42 and accompanying text.

[211] Section 8(3) of the Wagner Act provided that it would be an unfair labor practice for an employer:

> [B]y discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act . . . or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made.

National Labor Relations (Wagner) Act, *supra* note 209.

[212] *Id.*, §§ 8(2), 8(3).

[213] *See* NLRB v. General Motors Corp., 373 U.S. 734, 738 (1963).

curity not prohibited by state law, including the union shop and the agency shop.[214]

The broad interpretation of the extent of union security allowed under the Wagner Act was warranted by its legislative history. Both supporters and opponents of the Act understood it to allow the strongest form of union security—the closed shop.[215] The language of the statute and statements by supporters of the Act show that it also allowed weaker forms of union security.[216] In contravention of the general prohibition against employer discrimination based on union affiliation, Congress intended the first proviso to preserve the "status quo" with

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[214]The prevailing administrative and judicial view under the Wagner Act was or came to be that the proviso to § 8(3) covered both the closed and union shop, as well as less onerous union-security arrangements, if they were otherwise legal. The National Labor Relations Board construed the proviso as shielding from an unfair labor practice charge less severe forms of union-security arrangements than the closed or the union shop, including an arrangement in *Public Service Co. of Colorado* [requiring nonunion members to pay an agency fee].

Id. at 739–40 (citing J.E. Pearce Contracting & Stevedoring Co., 20 N.L.R.B. 1061, 1070–73 (1940) (section 8(3) of Wagner Act allows agency shop)); M & J Tracy, Inc., 12 N.L.R.B. 916, 931–34 (1939) (section 8(3) allows arrangement giving hiring preference to union members)) (citations omitted). *See also* Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 361 (1949) (closed shop lawful under section 8(3) of the Wagner Act); Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd., 336 U.S. 301, 307 (1949) (Wagner Act did not preclude state regulation of union security agreements, but merely disclaimed former policy "hostile to the closed shop or other forms of union-security"); General Motors Corp., 133 N.L.R.B. 451 (1961) (section 8(a)(3) of NLRA allows agency shop agreements), *enforcement denied*, 303 F.2d 428 (6th Cir. 1962), *rev'd*, 373 U.S. 734 (1963); Public Service Co. of Colorado, 89 N.L.R.B. 418 (1950) (Wagner Act allows agency shop agreements).

[215] *See, e.g.*, *National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 305 (1935) [hereinafter *1935 Senate Hearings*], *reprinted in* 1–2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1373, 1691; *id.* at 602–03, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1988–89; 79 CONG. REC. 7673–74 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2345, 2394–95; *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 61 (1935) [hereinafter *1935 House Hearings*], *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2473, 2535.

[216] The language of the proviso does not require that union membership be a *pre*condition to employment. Thus it allows at least the closed shop and the union shop. Furthermore, in commenting on the final bill, Senate counsel indicated in a memorandum that the exemption of the proviso was not limited to the closed or union shop:

> Unless this change is made as provided in S. 1958, most strikes for a closed shop or even for a preferential shop would by this act in effect be declared to be for an illegal purpose . . . . As the legislative history of [National Industrial Recovery Act] § 7(a) demonstrates, nothing in that section was intended to deprive labor of its existing right in many States to contract or strike for a closed or preferential shop . . . . No reason appears for a contrary view here.

Comparison Memorandum, *supra* note 199, at 29, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1319, 1354–55.

respect to union security agreements.[217] Section 8(3) of the Wagner Act was not intended to outlaw any form of union security, but if a form was illegal under state law, section 8(3) would not pre-empt its prohibition.[218] Additionally, Congress intended section 8(3) to clear up the courts' uncertainty over whether section 7(a) of the NIRA outlawed the closed shop and to prevent such confusion under the general prohibition against employer discrimination in section 8(3). The proviso was drafted to preserve

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[217] Responding to "misconceptions" that the proviso to section 8(3) of the Wagner Act would pre-empt state laws outlawing the closed shop, the Senate report on the bill stated:

> In other words, the bill does nothing to facilitate closed-shop agreements to or [sic] make them legal in any state where they may be illegal; it does not interfere with the *status quo* on this debatable subject but leaves the way open to such agreements as might now be legally consummated . . . .

S. REP. No. 573, 74th Cong., 1st. Sess. 11–12 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2300, 2311.

Similarly in debate on the proviso Senator Wagner (D-N.Y.) stated:

> The provision will not change the status quo. That is the law today; and wherever it is the law today that a closed-shop agreement can be made, it will continue to be the law. By this bill we do not change that situation.

79 CONG. REC. 7673 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2345, 2395.

[218] The House report on the Wagner Act stated:

> The proviso to the third unfair labor practice, dealing with the making of closed-shop agreements, has been widely misrepresented. The proviso does not impose a closed shop on all industry; it does not give new legal sanctions to the closed shop. All that it does is to eliminate the doubts and misconstructions in regard to the effect of section 7(a) [of the National Industrial Recovery Act prohibiting employer discrimination with respect to union affiliation] upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill . . . . The bill does nothing to legalize the closed-shop agreement in the States where it may be illegal; but the committee is confident that it would not be the desire of Congress to enact a general ban upon closed-shop agreements in the States where they are legal.

H.R. REP. No. 969, 74th Cong., 1st Sess. 17 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2910, 2927. Similarly, in his major speech to the Senate in support of the bill, Senator Wagner said:

> While outlawing the organization that is interfered with by the employer, this bill does not establish the closed-shop or even encourage it. The much-discussed closed-shop proviso merely states that nothing in any Federal law shall be held to illegalize the confirmation of voluntary closed-shop agreements between employers and workers.

79 CONG. REC. 7570 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2321, 2335. Representative Connery (D-Mass.), House sponsor of the bill, opposed an amendment offered by Representative Taber (R-N.Y.) to strike the proviso allowing union security agreements by alleging that it would allow 51% of the employees in any organization to bring about the discharge of the other 49%:

> Mr. Chairman, I merely rise to say this in opposition: The closed-shop proposition in this bill does not refer to any State which has any law forbidding the closed shop. It does not interfere with that in any way.

79 CONG. REC. 9726 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3112, 3217.

agreements requiring "membership" against "this Act [and] . . . any other statute of the United States" to make it clear that the closed shop was not outlawed by either section 7(a) or section 8(3).[219] The desire to clarify that federal law allowed the closed shop seems to be the only significance of using the word "membership" in section 8(3).

Congress's determination to carve such an exception for union security agreements out of the general prohibition against employer discrimination is not surprising. Unions' objectives in seeking such agreements fulfill many of Congress's purposes in enacting the Wagner Act. Through the Wagner Act, Congress sought to increase employee control over the rules of the workplace, to protect employees' right to organize, to foster unions and collective bargaining, to promote stability in industrial relations, and to shift bargaining power from employers to employees.[220] By encouraging a stable system of collective bargaining with more power in the hands of employees, Congress hoped that employees would gain both a greater voice in the operation of their workplace and a greater share of the fruits of their labor, and that the nation as a whole would enjoy a greater measure of industrial peace and economic prosperity.[221] Union

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[219] The Senate report on the bill states:

> The reason for the insertion of the proviso is as follows: According to some interpretations, the provision of section 7(a) of the National Industrial Recovery Act [48 Stat. 198], assuring the freedom of employees to organize and bargain collectively through representatives of their own choosing, was deemed to illegalize the closed shop. The Committee feels that this was not the intent of Congress when it wrote 7(a): that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject.

S. REP. NO. 573, 74th Cong., 1st Sess. 11 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2300, 2311. Similarly the House report states with respect to the proviso in section 8(3) of the Wagner Act:

> All that it does is eliminate the doubts and misconstructions in regard to the effect of section 7(a) [of the NIRA prohibiting employer discrimination on the basis of union affiliation] upon closed-shop agreements, and the possible repetition of such doubts and misconstructions under this bill, by providing that nothing in the bill or in section 7(a) or in any other statute of the United States shall illegalize a closed-shop agreement between an employer and a labor organization . . . .

H.R. REP. NO. 969, 74th Cong., 1st Sess. 17 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2910, 2927.

[220] National Labor Relations Act, § 1, 49 Stat. 449 (codified as amended at 29 U.S.C. § 151 (1982)). *See also* Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199, 206, 215–18 (1960); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 281–84 (1978); Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1126–27 (1986).

[221] Keyserling, *supra* note 220, at 218–24.

a longer and more eloquent statement for allowing union security agreements. In extended comments published in the Congressional Record on the day the House first passed the Wagner Act,[228] Representative Beiter argued that the closed shop allowed unions to exercise "collective responsibility" in meeting their obligations under collective bargaining to supply good, efficient, and safe workers.[229] The congressman also argued that the closed shop was necessary to protect individuals and unions from employer discrimination[230] and to promote stability in labor relations.[231] He then concluded that such stability in labor relations was necessary for industrial peace.[232] Finally,

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[228] 79 CONG. REC. 9732–35 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3228, 3232–34. The final version of the Act was agreed to in conference committee, without relevant changes, and passed by the House on June 27, 1935. 79 CONG. REC. 10300 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3260, 3267.

[229] A well-organized union offers to supply all the labor an employer needs in a certain line. It proposes a contract covering wages, hours, and so forth. It is based on the principle of collective bargaining and, as a necessary corollary, collective responsibility. The union guarantees efficient and good work on the part of the employees. It cannot assume responsibility for outsiders having no control over them.

79 CONG. REC. 9732 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3228, 3231.

[230] The closed shop is the only sure protection for trade agreements and for the defense of the individual. The open shop destroys organization, and in reality is the open door through which the union man goes out and the non-union man takes his place. The open shop means uncertainties, anxiety, and a shifting basis for the principles of industry. Under the open shop, the easy job goes to the non-union man, to the friend of the employer; the hard and dangerous task to the man whose devotion to his fellows incurs the enmity of the boss.

Id. at 9733, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3233.

[231] [The principle of the closed shop] asserts that a shop cannot be half union and half non-union and, therefore, it asks the employer who is willing to recognize the union at all, and with it the principle of collective bargaining, to agree to employ none but union labor. The union shop, in other words, is to be closed to non-union workmen, not only in the interest of the contracting employees, but also in the interest of the employer . . . . In practice it was discovered that majority rule was best for employers as well as employees. Workers found it impossible to approach the employer in a friendly spirit if they remained divided among themselves. Employers likewise found it more satisfactory to confer voluntarily with a united and contented group of workers than with a group torn by internal dissention. Singleness of purpose and responsibility on each side gave to business transactions that stability which every employer desires.

Id. at 9732, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3231–32.

[232] *Id.* at 9732–33, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3232–33.

Representative Beiter also argued that it is the right of union members to contract with their employers to be free from association with people they considered "disloyal to . . . [their] class":

The right of every man to sell his labor as he sees fit is exactly the right on which the closed shop is based. The right to work and to contract for work includes the right to refuse to work except under certain conditions, and the nonemployment of certain classes of labor may very well be one of these

security agreements help to achieve all these purposes as well as to facilitate and to reinforce such a collective bargaining system.[222] Thus, it is reasonable to infer that to the extent union security agreements achieve the general purposes of the Wagner Act, these purposes were behind Congress's preservation of the status quo on union security agreements.

This inference is supported by the express statements of congressmen contained in the legislative history of the Wagner Act.[223] Senator Robert Wagner (D-N.Y.), in testimony before the Senate Education and Labor Committee, defended the proviso's allowance of the closed shop by attributing to "many experts" the belief that the closed shop[224] is "necessary, in some situations, to obtain for labor equality of bargaining power [with management] and substantial justice."[225] In later testimony before the Senate committee, the House Committee on Labor, and the full Senate, the Senator made a similar (perhaps conclusory) attribution that "many" believe that the closed shop "at times may be necessary to advance and preserve the living standards of employees."[226] Comments by Senator Wagner and the Senate Report on the bill suggest that the existing law on union security agreements was working well and that no adequate reason had been advanced to disrupt industrial relations and industrial peace by outlawing extant union security agreements.[227] Representative Alfred Beiter (D-N.Y.), a supporter of the bill, made

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[222] *See supra* notes 201–208 and accompanying text.

[223] Supreme Court holdings also partially support this inference. *See, e.g.*, Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 364 (1949) ("It is quite reasonable to suppose that Congress thought it conducive to stability of labor relations that parties be required to live up to a valid closed-shop contract made voluntarily with the recognized bargaining representative . . . .").

[224] Comments contained in the legislative history most often state the purposes of allowing union security agreements with respect to the closed shop because that was the form of union security put at issue by the errant court interpretations of NIRA section 7(a). Nonetheless, the reasoning behind these statements applies to union security agreements in general.

[225] *1934 Senate Hearings*, *supra* note 117, at 9, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 39.

[226] *1935 Senate Hearings*, *supra* note 215, at 41, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1417. Senator Wagner made similar comments during the Senate debate, 79 CONG. REC. 7570 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2321, 2335, and in the House committee hearings, *1935 House Hearings*, *supra* note 215, at 16, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2490.

[227] S. REP. NO. 1184, 73d Cong., 2d Sess. 6 (1934), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1099, 1105; *1934 Senate Hearings*, *supra* note 117, at 41, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1417; *1935 House Hearings*, *supra* note 215, at 16, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2490.

the House and Senate committees heard testimony from supporters of the bill arguing that union security agreements were necessary to allow unions to exercise responsibility,[233] to promote stability in labor relations,[234] to prevent employer discrimination,[235] to strengthen unions in order to increase employees' say in the operation of the workplace, and to maintain wages to prevent a worsening of the Great Depression.[236]

3. The Taft-Hartley Amendments

The NLRA was substantially amended in 1947 with the passage of the Taft-Hartley Act.[237] After renumbering section 8(3) as section 8(a)(3),[238] the Act amended the first proviso to limit the allowance of union security agreements to agreements which required membership as a condition of employment "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . ."[239] A second proviso to section 8(a)(3) was added, prohib-

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> conditions. The right of the non-union man is not infringed upon when the unionist merely refuses to work beside him or when he asks the employer to choose between them. As to the employer, he has the right to hire anyone he pleases, and he may discriminate at will against union and nonunion labor . . . . The reasons that appeal to a union man for not working with a nonunion man are manifest and obvious. Men instinctively love the society of their kind, whether in work or play, and the man who desires the society of his companions must arrange his life so that his associates are content to live with him.
>
> Trade unionists have for centuries believed that they were upholding the rights of men, protecting the welfare of their class, and promoting the interests of their homes; that without the union shop, their liberty and independence would be gone. This is not a fact of trade unionism alone, but a deep abiding fact in human life. In the last analysis, it is the law of self-defense; and employers have exactly the same feeling toward one of their members who gives his influence to the other side. Both feel that the offending man is disloyal to his class, and just so long as industry is carried on by two classes in hostile camps this feeling must and will continue.

Id. at 9732, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3232.

[233] *1935 Senate Hearings*, *supra* note 215, at 121 (statement of William Green, President of the American Federation of Labor), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1497.

[234] *Id.*

[235] *Id.* at 180 (statement of Professor H.A. Mills), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1560.

[236] *1935 House Hearings*, *supra* note 215, at 86–87 (statement of William Dennison, representative of Society of Designing Engineers), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2560–61.

[237] Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, § 101, 61 Stat. 136.

[238] The renumbering occurred because section 8(a) was used to list employer unfair labor practices while a separate section 8(b) was created to list union unfair labor practices. *Id.*, 61 Stat. at 140–42 (enacting 29 U.S.C. § 158(b)).

[239] *Id.*, 61 Stat. at 140–41 (codified as amended at 29 U.S.C. § 158(a)(3) (1982)).

iting employer discrimination for nonmembership in the union if the employer has "reasonable grounds" for believing that "membership was not available to the employee on the same terms and conditions generally applicable to other members" or "membership was denied or terminated for reasons other than the failure . . . to tender the periodic dues and the initiation fees uniformly required as a condition of . . . membership."[240] Finally, the Act added a requirement that a majority of employees in the bargaining unit had to approve a union security agreement in an election conducted by the Board before the union could negotiate such an agreement.[241] This requirement was repealed in 1951.[242]

The legislative history of the Taft-Hartley Act demonstrates that Congress understood that the new language in section 8(a)(3) prohibited the closed shop and limited the enforceability of the remaining lawful types of union security agreements. The limitation on the first proviso—that union security agreements could require membership only after thirty days of employment—was understood to prohibit the closed shop's pre-condition of union membership for employment.[243] However, the union shop and other lesser forms of union security were to remain lawful.[244] The second proviso was added to prohibit an

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[240] *Id.*, 61 Stat. at 141.

[241] *Id.* Employees could rescind this approval in a new election at any time at least one year after the approval election. *Id.*, 61 Stat. at 145 (codified as amended at 29 U.S.C. § 159(e) (1982)).

[242] Act of Oct. 22, 1951, ch. 534, § 1(b), (c), 65 Stat. 601, 601–02. The requirement was repealed because unions won approximately 97% of these approval elections with an average vote of 77.5% in their favor. As a result, Congress saw these elections as a futile and expensive exercise. 1951 NLRB ANN. REP. 54 (1952); 1949 NLRB ANN. REP. 6 (1950). *See also* H.R. REP. NO. 1082, 82d Cong., 1st Sess. 2–3 (1951). Current law retains such elections only as an option for rescission of approval. 29 U.S.C. § 159(e) (1982).

[243] The House Report on the Hartley bill states:

> The bill bans the closed shop. Under carefully drawn regulations it permits an employer and a union voluntarily to enter into an agreement requiring employees to become and remain members of the union a month or more after the employer hires them or after the agreement is signed.

H.R. REP. NO. 245, 80th Cong., 1st. Sess. 9 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 292, 300. *See also id.* at 34; S. REP. NO. 105, 80th Cong., 1st Sess. 3, 5–7 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 409, 411–13; 93 CONG. REC. 5036, 5088 (1947) (remarks of Sen. Taft (R-Ohio)), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1421.

[244] The House Report on the Hartley bill stated that "the bill permits, subject to certain regulations and limitations, 'union security' agreements in the nature of union shops and maintenance of membership, but it bans the closed shop." H.R. REP. NO. 245, 80th Cong., 1st Sess. 30 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 292, 321. *See also id.* at 34, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 325. The union security language of the Hartley Act varied somewhat

employer from discharging an employee under a lawful union security agreement if the union discriminatorily excluded the employee from membership or denied that membership for any reason other than failure to pay dues.[245] The legislative history suggests that employees who are discriminatorily excluded from the union are protected from discharge under the first clause of the second proviso even if they do not apply for membership or tender union dues.[246] However, the legislative history is ambiguous as to whether, under the second clause of the second proviso, the employee can be required to apply for union membership as well as pay dues.[247]

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from the language which was finally passed in the Taft-Hartley Act, but these differences were irrelevant to the question of whether the statute allowed the union shop and lesser forms of union security. The Senate report on the Taft bill stated that the bill "abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop or maintenance of membership . . . ." S. REP. NO. 105, 80th Cong., 1st Sess. 3 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 409. *See also* H.R. CONF. REP. NO. 510, 80th Cong., 1st. Sess. 41, 44 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 505, 545, 548; 93 CONG. REC. 3950, 3952 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1009; 93 CONG. REC. 5036, 5079 (1947) (remarks of Sen. Malone (R-Nev.) to the effect that "the proposal to outlaw the union shop has never been seriously considered by a majority of this body"), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1405.

[245] In the second place, we have proposed a proviso in the case where a man is refused admittance to a union, . . . In effect, we say, 'If you are going to have a union shop, then you must have an open union . . . .' The bill further provides that if the man is admitted to the union, and subsequently is fired from the union for any reason other than the nonpayment of dues, then the employer shall not be required to fire that man . . . . The employee has to pay the union dues. But on the other hand, if the union discriminates against him and fires him from the union, the employer shall not be required to fire him from the job.

93 CONG. REC. 3950, 3953 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010; *see also* S. REP. NO. 105, 80th Cong., 1st Sess. 20 (1947) (remarks of Sen. Ellender (D-La.)), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 426; 93 CONG. REC. 4258 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1054, 1061–62; 93 CONG. REC. 4317–18 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1090, 1096–97; 93 CONG. REC. 5087–88 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1420–21.

[246] Senator Taft's explanation of the first clause of the second proviso does not seem to require that the employee who suffers from discrimination apply for union membership or pay union dues. 93 CONG. REC. 3953 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010. However, the Board has interpreted the first clause of the proviso as not requiring payment of dues by employees who have been discriminatorily denied union membership. Union Starch & Refining Co., 87 N.L.R.B. 779, 784 (1949), *enforced*, 186 F.2d 1008 (7th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951).

[247] The second proviso refers to the employee's membership being "denied or terminated," perhaps implying that the employee must apply for membership. 29 U.S.C. § 158(a)(3) (1982). The examples of the second proviso's application given by Senator Taft seem to contemplate application for membership. 93 CONG. REC. 3952–53 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010. Represen-

Supporters of the Taft-Hartley bill understood that the dues which could be required of employees under the second proviso were the union's full periodic dues and initiation fees. In explaining the amendments to section 8(a)(3), Senator Robert Taft (R-Ohio) stated unequivocally that "[t]he employee has to pay the union dues."[248] Later, in further explanation of the workings of the second clause of the second proviso of section 8(a)(3), the Senator stated:

> The union could refuse a man admission to the union, or expel him from the union; but if he were willing to enter the union and pay *the same dues as other members* of the union, he could not be fired from his job because the union refused to take him.[249]

The same understanding is reflected in comments of other supporters of the bill and in House and Senate reports on the bill.[250]

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tative Smith (D-Va.) also understood the Taft-Hartley bill to require an application for membership. 93 CONG. REC. A3141 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 906. *Cf.* 93 CONG. REC. 3614 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 736 (remarks of Rep. Buck (R-N.Y.) that under the Hartley bill, which had somewhat different wording with respect to membership requirements, an employee must join the union and pay dues to keep his job). However, House and Senate reports on the bill and some comments by its supporters and detractors suggest that all that could be required under the proviso was the payment of dues. S. REP. NO. 105, 80th Cong., 1st Sess. 7 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 413; H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 41 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 505, 545; 93 CONG. REC. 3550 (1947) (remarks of Rep. McConnell (R-Pa.) with respect to the Hartley bill), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 601, 640.

[248] 93 CONG. REC. 3953 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010.

[249] 93 CONG. REC. 4400 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1129, 1142. *See also* 93 CONG. REC. 4317–18 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1090, 1096–97, where Senator Taft four times refers to the money which the employee must pay under section 8(a)(3) as "union dues." The Senator also described the rule adopted under section 8(a)(3) as "substantially the rule now in effect in Canada." 93 CONG. REC. 5088 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1422. The Canadian "Rand Rule" required the payment of full union dues, but did not require membership application. Justice I.C. Rand of the Supreme Court of Canada set out the "Rand Rule" in an interest arbitration decision. Ford Motor Co., 1 Lab. Arb. (BNA) 439 (1946). At issue in the case was whether the collective bargaining agreement should contain a union shop clause and a dues check-off provision. *Id.* at 444. Basing his judgment on the "principles" held by the "large majority" of Canadians, Justice Rand declined to require a union shop (where employees must apply to or join the union), but did require that the employer check-off or deduct from each employee's wages "union dues," defined as "such sum as may from time to time be assessed by the union on its members according to its constitution, for general union purposes." *Id.* at 444–45. The decision thus required the payment of full periodic union dues by both members and nonmembers.

[250] In debate on the House floor, Representative Kersten (R-Wis.) stated "I also understand that [under] the provisions of the bill, . . . [employees] are merely required to pay reasonable dues which are required for the unions." 93 CONG. REC. 3615 (1947),

The dues and fees that could be required under section 8(a)(3) did not include special assessments for purposes not of general benefit to the employees or not part of the union's periodic dues.[251] However, Congress specifically rejected limitations on the amount a union could charge for periodic dues[252] and limited

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reprinted in 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 739. Representative Smith (D-Va.) understood the Taft-Hartley bill to provide that "the union cannot compel the employer to discharge an employee unless he refuses to join the union or maintain his membership in the union," presumably including full membership dues. 93 CONG. REC. A3141 (1947) (extension of remarks by Rep. Smith), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 906. Similarly, Senator Thye (R-Minn.) understood the bill to mean that "the employer can hire any man . . . , but after he has been in the plant 30 days he must become a qualified member of the union in order to remain on the payroll," indicating that he believed the employee must meet the qualifications of membership, i.e., paying full union dues. 93 CONG. REC. 5089 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1422. *See also* S. REP. NO. 105, 80th Cong., 1st Sess. 6–7 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 413; H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 41 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 505, 545.

Moreover, prohibiting unions from collecting full union dues from dissenters would have violated the Eightieth Congress's desire for a simple, unobtrusive statutory scheme. Senator Taft described the amendments to section 8(a)(3) as merely "[making it] an unfair labor practice for a union to try to get an employer to discharge a man who has been improperly fired from the union." 93 CONG. REC. 3954 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1012. Senator Taft also stated:

> I believe . . . [the amended section 8(a)(3)] will permit the continuation of existing relationships, and will not violently tear apart a great many long-existing relationships and make trouble in the labor movement; and yet at the same time it will meet the abuses which exist.

93 CONG. REC. 5088 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1420. Senator Taft assured the Congress that the Act's limitations on union security did not interfere with the internal operations of the union or require the employer to inquire into internal union affairs in deciding whether to discharge an employee under a union security agreement. 93 CONG. REC. 4318 (1947) ("The pending measure does not propose any limitation with respect to the internal affairs of unions."), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1090, 1097. The Senate report on the Act stated that "[t]he tests provided by the amendment [to prohibit discharge under a union security agreement] are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union." S. REP. NO. 105, 80th Cong., 1st Sess. 20 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 426.

[251] *See* Radio Officers' Union v. NLRB, 347 U.S. 17, 41 (1954) ("[The] legislative history clearly indicates that Congress intended to prevent utilization of union security agreements for any reason other than to compel payment of union dues and fees."); Local 959, Int'l Bhd. of Teamsters, 167 N.L.R.B. 1042, 1045 (1976) (special assessment cannot be collected under union security agreement). Among other problems, Congress sought to redress the experience of Cecil B. DeMille, who had been terminated from union membership and his job for refusing to contribute to a fund for a political cause which he opposed. 93 CONG. REC. 4528 (1947) (remarks of Sen. Ellender (D-La.)), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1054, 1061–62. Finally, Senator Taft stated that the rule adopted under section 8(a)(3) was "substantially" the rule in Canada. 93 CONG. REC. 5088 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1422. The Canadian "Rand Rule" did not include special assessments. Ford Motor Co., 1 Lab. Arb. (BNA) 439, 445 (1946).

[252] The Hartley bill, as originally passed by the House, prohibited initiation fees in excess of $25 unless the Board approved a greater amount as reasonable. It also

the use of dues only to the extent of prohibiting contributions to federal election campaigns.[253] Apparently, Congress was willing to trust union democracy to provide the necessary restraints on the size and uses of periodic union dues.[254]

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prohibited "dues or general or special assessments that are not uniform upon the same class of members, or are in excess of such reasonable amounts as the members thereof, . . . by a majority of those voting, . . . shall authorize." H.R. 3020, 80th Cong., 1st Sess. § 8(c)(2) (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 158, 179–80. However, the conference committee deleted these restrictions with the exception of section 8(b)(5)'s prohibition on a union charging excessive or discriminatory union initiation fees. H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 46 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 505, 550.

[253] Labor Management Relations Act of 1947, ch. 120, § 304, 61 Stat. 136, 159–60. This section of the Act amended § 313 of the Federal Corrupt Practices Act (1925), and was originally codified at 18 U.S.C. § 610. The latter was amended by the Federal Election Campaign Act of 1971, 86 Stat. 3 (1972), and then repealed by the Federal Election Campaign Act of 1976, 90 Stat. 490 (1976). Section 321 of the 1976 Act reenacted limitations on union and corporate political spending, which were codified at 2 U.S.C. § 441(b). This limitation has been held not to apply to union-controlled funds collected by voluntary contributions and kept segregated from union dues funds. Pipefitters Local 562 v. United States, 407 U.S. 385 (1972). *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976) (questioning the constitutionality of such limitations on campaign contributions); 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 571–72, 928; 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1526–35, 1603–04, 1609; Cantor, *supra* note 20, at 75.

[254] As discussed above, the House version of the bill originally included a limitation that union dues be "reasonable." *See supra* note 252. The Senate version of the bill contained no such limitation, and the Conference Committee rejected the limitation in the final version of the bill. Senator Taft explained the Senate conferees' reasons for refusing to accept this limitation:

> The Senate conferees refused to agree to the inclusion of this subsection in the conference agreement since they felt that it was unwise to authorize an agency of the Government to undertake such elaborate policing of the internal affairs of unions as this section contemplated without further study of the structure of unions. In the opinion of the Senate conferees the language which protected an employee from losing his job if a union expelled him for some reason other than nonpayment of dues and initiation fees, uniformly required of all members, was considered sufficient protection.

93 CONG. REC. 6601 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1526, 1540. There is a seeming contradiction in disallowing the charging of special assessments while setting no limitation on the amount of periodic dues and only one limitation on their use. Arguably, in a union the same democratic forces which would regulate the amount and uses of dues would also regulate the amount and uses of special assessments. However, Congress saw the special assessments as fraught with abuse. 93 CONG. REC. 4258 (1947) (remarks of Sen. Ellender (D-La.) concerning the case of Cecil B. DeMille), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1054, 1061–62. Although Congress might also have believed that a portion of periodic dues would be misused, the disallowance of special assessments but not periodic dues was in keeping with Congress's desire for an unobtrusive solution. Congress did not want to impose limitations on internal union affairs, 93 CONG. REC. 4318 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1090, 1097, or to make unnecessary trouble for unions, 93 CONG. REC. 5088 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1420. It thus made sense for Congress to prohibit the charging of special assessments to dissenting employees, thereby curing a serious problem with little intrusion into unions' internal affairs. It also made sense to refrain from prohibiting the collection of full union dues from dissenters, a remedy to a less serious problem that would involve a much greater intrusion into internal union affairs.

The Taft-Hartley amendments to section 8(a)(3) reflected the political compromises necessary to enact the legislation. The Eightieth Congress included many strong proponents of labor law reform. They sought to redress what they viewed as the excesses in union power allowed by the Wagner Act in unions' dealings with individual employees.[255] Some supporters of the bill would have liked to outlaw union security agreements altogether.[256] However, their zeal for amending the NLRA was tempered by the knowledge that a successful bill would need the support of a super-majority of Congress to survive a probable veto by President Truman.[257] As a result, the Taft-Hartley amendments to section 8(a)(3) reflected a compromise between those in Congress who opposed union security agreements and those congressmen who wanted no restraints on such agreements.[258]

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[255] *E.g.*, 93 CONG. REC. 3538 (1947) (remarks of Rep. Hoffman (R-Mich.)), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 601, 622–23; *id.* at 3544 (remarks of Rep. Barden (D-N.C.)); *id.* at 3547 (remarks of Rep. Schwabe (R-Minn.)); 93 CONG. REC. 3951 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1006–07; *id.* at 3953 (remarks of Sen. Taft). *See generally* Rosenthal, *The National Labor Relations Act and Compulsory Unionism*, 1954 WIS. L. REV. 53, 57–58. Congress also sought to redress what was viewed as excessive union power in bargaining with employers. *See generally* DEVELOPING LABOR LAW, *supra* note 160, at 35–36. However, this concern was addressed in other amendments prohibiting secondary boycotts and hot cargo provisions and not in the amendments to section 8(a)(3). *See* Labor Management Relations Act, ch. 120, § 8(b)(4), 61 Stat. 136, 141–42 (1947) (codified at 29 U.S.C. § 158(b)(4) (1982)); Labor-Management Reporting and Disclosure Act, § 704(b), 73 Stat. 519, 543–44 (1959) (codified at 29 U.S.C. § 158(e) (1982)).

[256] *E.g.*, 93 CONG. REC. 3612 (1947) (amendment by Rep. Hoffman (R-Mich.) to delete the first proviso of section 8(a)(3) allowing union security agreements), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 732–33; 93 CONG. REC. 5087 (1947) (amendment by Sen. Ball (R-Minn.) to delete the first proviso of section 8(a)(3) allowing union security agreements), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1418.

[257] F. DULLES, *supra* note 191, at 359.

[258] Rosenthal, *supra* note 255, at 58. While deciding a secondary boycott issue, the Supreme Court in Local 1976, United Bhd. of Carpenters v. NLRB, 357 U.S. 93 (1958) stated:

> It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law. The problem raised by these cases affords a striking illustration of the importance of the truism that it is the business of Congress to declare policy and not this Court's.

Id. at 99–100 (*cited in* Beck v. Communications Workers of Am., 800 F.2d 1280, 1293 (4th Cir. 1986) (Winter, C.J., dissenting), *aff'd*, 108 S. Ct. 2641 (1988)).

The amendments to section 8(a)(3) sought to eliminate only what were perceived as the worst abuses of union security.[259] These abuses were the denial of employment to non-union employees under the closed shop and the loss of employment by workers whose union membership was denied or terminated for arbitrary or discriminatory reasons under a union shop.[260] They were eliminated by outlawing the closed shop and by limiting the enforceability of union shop agreements to cases in which the employee neither had been discriminatorily excluded from union membership nor had failed to fulfill the objective membership requirement of paying dues.[261] Neither the abuses discussed nor the solution proposed related in any way to the payment of union dues or to the enforceability of agency shop agreements.[262]

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[259] "[T]hese amendments remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability by eliminating 'free riders' the right to continue such arrangements." S. REP. No. 105, 80th Cong., 1st Sess. 7 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 413. "[I]n this bill we are trying to be strictly practical and to meet the actual problems which have arisen, and not to go into the broader fields of the rights of particular persons." 93 CONG. REC. 5088 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1421. "However, both the House and Senate bills correct the worst abuses." 93 CONG. REC. A2378 (1947) (extension of remarks by Sen. Ball (R-Minn.)), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1523, 1524. *See also* NLRB v. General Motors Corp., 373 U.S. 734, 740–41 (1963) (Taft-Hartley intended to correct only the most serious abuses); 93 CONG. REC. 3952–53 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010–11; 93 CONG. REC. 5087–88 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, 1347, 1420–21.

[260] S. REP. No. 105, 80th Cong., 1st Sess. 6–7, 20 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 412–13; 93 CONG. REC. 3952–53 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010–11; 93 CONG. REC. 4258–59, 4262 (1947) (remarks of Sen. Ellender (D-La.)), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1054, 1061–62, 1068.

[261] It was important to Congress that the conditions under which an employee could be discharged under a union security agreement be objective not only from the union's perspective to protect the employee from union discrimination, but also from the employer's perspective to protect the employer from liability under section 8(a)(3). S. REP. No. 105, 80th Cong., 1st Sess. 20 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 426.

[262] Senator Taft and Senator Donnell (R-Mo.) made it clear that their primary concern was employees' ability to obtain and retain employment rather than their obligation to pay dues. When questioned by Senator Donnell as to why the union shop should remain lawful when the closed shop was being prohibited, Senator Taft responded, "the great difference is that in the [union shop] . . . a man can get a job without joining the union or asking favors of the union . . . . The fact that the employee will have to pay dues to the union seems to me to be much less important. The important thing is that the man will have the job." 93 CONG. REC. 5088 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1422. Senator Donnell responded, "I do not regard the payment of dues as the important point, at all." *Id.*

Congress rejected floor amendments that would have outlawed all forms of union security agreements.[263] A variety of purposes for preserving the legality of the union shop and the enforceability of the obligation to pay dues were offered.[264] Senator Taft defended the legality of the union shop. He argued that it was the "customary" form of union security, of long and widespread usage, that it was not fatally flawed like the closed shop, that his bill had remedied the closed shop's abuses, and that outlawing it would upset established relationships and cause industrial strife.[265] He defended the enforcement of the obligation to pay dues by arguing that it prevented employees from free-riding on union benefits.[266] The Senate Report on the bill stated that the Taft-Hartley amendments to section 8(a)(3) "remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promote[] stability by eliminating 'free riders' the right to continue such arrangements."[267]

In the House, a number of representatives voiced support for union security agreements. Representative Buck (R-N.Y.) defended the union shop by arguing that "millions of men are working on union [shop] terms satisfactory to the men and satisfactory to the employer" and that prohibiting the union shop "would lead to complete chaos in labor relations."[268] Representatives Jennings (R-Tenn.) and Robsion (R-Ky.) raised the free-rider argument, asserting that it was "fair" to require all employees to pay dues to the union since all employees benefit from the union.[269] Representative MacKinnon (R-Minn.) stressed the importance of union security agreements to shifting

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[263] Amendments were offered on both the House and Senate floors to delete the first proviso of section 8(a)(3), thereby outlawing all forms of union security agreements. *See supra* note 256.

[264] *Id.*

[265] 93 CONG. REC. 5087–88, 5089 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, 1347, 1420, 1422; *see also* 93 CONG. REC. 3952–53 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010–11.

[266] 93 CONG. REC. 5089 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1422; 93 CONG. REC. 3953 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010.

[267] S. REP. NO. 105, 80th Cong., 1st Sess. 7 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 413.

[268] 93 CONG. REC. 3614 (1947) (remarks of Rep. Buck), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 736.

[269] *Id.* at 3616–17, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 740–42.

bargaining power to unions so that they can "combat the large concentration of economic power that exists on the other side."[270] Representative Kersten (R-Wis.) opined that union security agreements were necessary in order for unions to be "effective."[271] Finally, Representative Brehm (R-Ohio) argued for the freedom of the union majority contractually to require all employees to support the union.[272]

The free-rider argument raised by the supporters of the bill was not limited in purpose to the recoupment of collective bargaining expenses. Although collective bargaining benefits were used as examples of the benefits on which employees could free-ride,[273] none of the statements limited the argument to such examples.[274] Such a limitation would have been contrary to Congress's understanding that the dues collectible under section 8(a)(3) were full union dues. Indeed, each of the congressmen who used collective bargaining benefits as examples of benefits which are subject to free-riding stated, shortly before or after his argument, that the dues that could be required under section 8(a)(3) were full union dues.[275] Congress was well aware that a portion of periodic union dues was commonly used for political and other non-collective bargaining purposes.[276] No rationale

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[270] Representative MacKinnon stated: "I . . . believe that . . . we should permit and encourage voluntary [employer-union agreements for] union security, in order that the American worker may fairly combat the large concentration of economic power that exists on the other side." *Id.* at 3613.

[271] *Id.* at 3615.

[272] *Id.* at 3614.

[273] S. REP. No. 105, 80th Cong., 1st Sess. 7 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 407, 413; 93 CONG. REC. 3616 (1947) (remarks of Rep. Jennings), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 740; *id.* at 3617 (remarks of Rep. Robsion); 93 CONG. REC. 5089 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1422.

[274] *See supra* notes 262–272 and accompanying text. *See also* 93 CONG. REC. 3614 (1947) (remarks of Rep. Buck), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 736; 93 CONG. REC. 3953 (1947) (remarks of Sen. Taft), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1005, 1010.

[275] Representative Jennings understood that dissenters would have to "contribute dues like the others." 93 CONG. REC. 3616 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 669, 740. Representative Robsion referred to the amount which the dissenters must pay as "union dues" and argued that it was fair that the dissenters contribute their "equal share" in securing union benefits. *Id.* at 3617, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 741. Senator Taft argued that under the provisions of the bill "a man can get a job . . . if, in effect, he joins the union and pays the union dues." 93 CONG. REC. 5088 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1421.

[276] *See, e.g.*, 93 CONG. REC. 6593–98 (1947) (Senate debate concerning union political contributions), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1526, 1526–35; Cantor, *supra* note 20, at 74. In fact, several legislators noted in the debates over the Taft-Hartley amendments that organized labor was spending considerable sums

for why a union could collect only collective bargaining expenses from dissenters was discussed.[277] Such a limitation constrains the free-rider argument well short of its full logical force. Employees can free-ride on any public good provided by the union, including political representation and organizing as well as collective bargaining services.[278]

4. The Purposes of Union Security Agreements Under the National Labor Relations Act: A Synthesis

To discuss the synthesis of Congress's purposes in preserving union security agreements under the Wagner and Taft-Hartley Acts as represented in the present NLRA, it is illuminating to place these purposes in the context of the previous discussion of the effects of union security agreements and the purposes of promoting such agreements.[279]

In the Wagner Act, Congress preserved all of the effects of union security agreements: union control over the constituency of the workplace, increased interchangeability of workers, and increased support (financial or otherwise) for unions. It made sense for Congress to preserve union security agreements because many of the unions' objectives in seeking such agreements supported Congress's general purposes in enacting the Wagner Act. The Act's legislative history suggests that Congress preserved union security agreements to achieve all, or almost all, of the laudable union objectives in seeking such agreements: increasing union control over the quality of the work force, decreasing employer incentive to discriminate against union supporters, avoiding resentment of union supporters for non-supporters, preventing free-riders, providing sufficient support for

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to oppose the passage of the Act. 93 CONG. REC. 6605–06 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1526, 1549–51.

[277] Cantor, *supra* note 20, at 81–82; Gaebler, *Union Political Activity or Collective Bargaining?: First Amendment Limitations on the Uses of Union Shop Funds*, 14 U.C. DAVIS L. REV. 591, 603 (1981).

[278] It seems doubtful that in 1947 Congress envisioned the distinction the Supreme Court would draw in Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 447–48 (1984), that unions are entitled to compensation for collective bargaining expenses they incur in the course of performing their duties as exclusive representatives but not their other expenses. The doctrine of the duty of fair representation and the legal obligation of the exclusive representative to provide collective bargaining services to dissenters were not extended to the NLRA until 1955. Syres v. Oil Workers Int'l Union, Local 23, 350 U.S. 892 (1955) (per curiam) (reversing 223 F.2d 739 (5th Cir. 1955)).

[279] *See supra* notes 201–208 and accompanying text.

the union, shifting bargaining power from the employer to the employees, and promoting stability in labor relations.

In the Taft-Hartley Act, Congress sought to place limitations on union security agreements to eliminate union control over the constituency of the workplace. The abuses that the Taft-Hartley amendments were designed to eliminate were by-products of such control. By prohibiting the closed shop and by limiting the enforcement of the union shop to cases in which the union did not discriminate against the employee and the employee failed the objective requirement of paying union dues, Congress sought to remove union discretion over who did and did not work. Congress did not seek to constrain or eliminate the effectiveness of union security agreements in increasing the interchangeability of workers or providing support for the union. Neither the abuses at which the Act was aimed nor the solution devised by Congress were related to the agency shop or the obligation to pay dues.

Through the Taft-Hartley Act, Congress sought to amend the Wagner Act, not to repeal it. To the extent that Congress's purposes in enacting the Taft-Hartley Act conflict with its purposes in enacting the Wagner Act, the purposes of the Taft-Hartley Act must be given pre-eminence. By seeking to abolish union control over the constituency of the workplace, the Taft-Hartley Act countermanded Congress's prior purpose under the Wagner Act of allowing union control over the quality of the work force. However, in enacting the Taft-Hartley Act, Congress did not intend to abandon its prior purposes under the Wagner Act, which related to increased interchangeability of workers and support for unions. Thus, Congress's purposes under the Wagner Act of decreasing employer incentive to discriminate, preventing free-riders, providing sufficient support for unions, shifting bargaining power from the employer to the employees, and promoting stability in labor relations survive as purposes behind today's NLRA section 8(a)(3). Indeed, in response to proposed amendments to prohibit union security agreements, the advocates of the Taft-Hartley Act reiterated many of the same purposes for preserving union security agreements expressed by advocates of the Wagner Act.[280]

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[280] The only argument in favor of union security agreements related to their effectiveness at increasing worker interchangeability or providing support to the union which was raised in the passage of the Wagner Act but not raised by the Congress which passed the Taft-Hartley Act was the argument that union security agreements decrease

In conclusion, there are many purposes behind Congress's limited preservation of union security under section 8(a)(3) of the NLRA. Most of Congress's purposes under the Wagner Act continue as purposes behind the present section 8(a)(3) of the NLRA. Far from limiting its purpose merely to preventing free-riding on collective bargaining benefits, Congress implicitly and explicitly stated purposes ranging from the lessening of incentive for employer discrimination to the promotion of stability in labor relations. Moreover, Congress's purpose of the prevention of free-riders was never limited to collective bargaining benefits, nor could it logically be so limited.

III. *BECK* AND THE DOCTRINE OF CONSTRUING STATUTES TO AVOID CONSTITUTIONAL QUESTIONS

The Supreme Court's interpretation of section 8(a)(3) varies greatly from the interpretation suggested by the words, administrative interpretations, and legislative history of the NLRA. In *Beck*, the Court drew an identity between section 8(a)(3) and section 2 Eleventh of the Railway Labor Act[281] and imposed on section 8(a)(3) the same limited interpretation of the purpose and enforceability of union security agreements as it had previously found under section 2 Eleventh. The Court held that Congress's sole purpose in preserving union security agreements under section 8(a)(3) was to allow the prevention of free-riding on collective bargaining benefits. This limited vision of statutory purpose was used to determine that only those expenses "necessarily or reasonably" related to collective bargaining can be charged to dissenting employees. The Court therefore held that section 8(a)(3) does not allow the compulsion of dues

employer incentive to discriminate on the basis of union affiliation. However, there is evidence that the Taft-Hartley Congress was aware of this argument and rejected the notion that it was no longer relevant to the purposes of section 8(a)(3). Arguing in favor of his amendment to prohibit all union security agreements, Senator Ball (R-Minn.) stated that the only purpose for allowing such agreements was to prevent employer discrimination and that section 8(a)(3)'s general prohibition on employer discrimination adequately solved this problem. 93 CONG. REC. 5087 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1347, 1419. Senator Ball's amendment was soundly defeated, 57 to 21. *Id.* at 5092. There is no evidence in the legislative history to suggest that Congress sought to limit the purpose of allowing union security agreements to prevent employer discrimination any more than necessary to eliminate union control over the constituency of the workplace.

[281] *See supra* notes 106–111 and accompanying text.

for non-collective bargaining purposes under an agency shop agreement.[282]

Direct examination of the words, administrative interpretations, and legislative history of section 8(a)(3) suggests a much broader interpretation of the purpose and enforceability of union security agreements. These sources establish that Congress intended section 8(a)(3) to allow full enforcement of an agency shop agreement. The legislative histories of the Wagner and Taft-Hartley Acts demonstrate that Congress preserved union security agreements under section 8(a)(3) because such agreements lessen employer incentive to discriminate on the basis of union affiliation, lessen animosity of union supporters towards non-supporters, prevent free-riding on public goods provided by unions, provide unions with resources necessary to be effective, shift bargaining power from the employer to the employees, and promote stability in labor relations.[283]

The Court's interpretation of section 8(a)(3) is inconsistent with the best evidence of congressional intent in the enactment of the NLRA. Why did the Court's reliance on its prior interpretations of section 2 Eleventh produce such a poor interpretation of section 8(a)(3)? There are several possible explanations.

The Court may have been mistaken that Congress intended an identity between section 8(a)(3) and section 2 Eleventh. However, this explanation appears doubtful. The similar language and legislative histories of the two statutes suggest that Congress did intend to allow the same forms of union security agreements under the two statutes.[284] Moreover, although when it enacted section 2 Eleventh Congress may not have understood all the purposes for union security agreements represented in section 8(a)(3), it has been argued persuasively that Congress understood section 8(a)(3) to allow agency shop agreements.[285]

Perhaps the Court's interpretation of section 8(a)(3) has gone awry because of its reliance on an indirect method of interpretation: analogizing to a similar statute rather than directly examining section 8(a)(3)'s words, administrative interpretations, and legislative history. However, the Court's interpretation

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[282] *Beck*, 108 S. Ct. at 2652.

[283] *See supra* text accompanying notes 279–280.

[284] *Beck*, 108 S. Ct. at 2649 (quoting 96 CONG. REC. 17055 (1951) (remarks of Rep. Brown (R-Ohio))).

[285] Cantor, *supra* note 20, at 72–73.

seems to suffer less from reliance on second-best evidence than from a design to avoid a straightforward interpretation of section 2 Eleventh and consequently of section 8(a)(3). In interpreting the second of two similar statutes, one would expect that the Court would rely on a substantive analysis of its language and on consideration of the intrinsic and extrinsic evidence relevant to both statutes.[286] The Court's interpretation of section 2 Eleventh does not rest on such considerations. By the Court's own admission, its opinions interpreting section 2 Eleventh do not give merit to the plain language of the RLA.[287] Moreover, those opinions do not recognize an identity between section 2 Eleventh and section 8(a)(3), nor do they consider the interpretations or legislative history of section 8(a)(3) although section 8(a)(3) was passed four years before section 2 Eleventh.[288] Thus, the sole basis for the interpretation of section 2 Eleventh imposed on section 8(a)(3) in *Beck* is the legislative history of section 2 Eleventh.[289] This history chronicles events which occured four years after the passage of section 8(a)(3) and are arguably irrelevant to its interpretation.

To answer why the *Beck* opinion makes such a pronounced deviation from the congressional intent of section 8(a)(3), we must consider why the Court so narrowly constrained its consideration of intrinsic and extrinsic evidence in its interpretation of section 2 Eleventh. The Court may have just been mistaken in its interpretation of section 2 Eleventh and consequently of section 8(a)(3). It may have decided to construe these statutes according to its own predilections without proper deference to legislative intent. However, the most likely explanation is that the Court's interpretation of section 2 Eleventh was influenced by its desire to avoid the constitutional question of whether the negotiation and observance of agency shop agreements under the RLA violates dissenting employees' constitutional rights. Because the Court's interpretation of section 8(a)(3) relies so heavily on its prior interpretation of section 2 Eleventh, it also reflects these constitutional concerns.[290]

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[286] *See supra* notes 134–135, 143–145 and accompanying text.

[287] See Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 445–46 (1984).

[288] *Ellis*, 466 U.S. 435; International Ass'n of Machinists v. Street, 367 U.S. 740 (1961); Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956).

[289] The Court does not have the benefit of administrative rulings on section 2 Eleventh since there is no equivalent of the NLRB under the RLA.

[290] Whether the *Beck* decision is a mistake, an abuse of power, or an application of the doctrine of avoiding constitutional questions, it should be noted that the case

A. *The* Beck *Decision as a Statutory Application of the Doctrine of Avoiding Constitutional Questions*

The Court has developed a doctrine of constitutional adjudication that where a "serious question" of a statute's constitutionality has been raised, the Court should, if possible, "fairly" construe the statute to avoid the constitutional question.[291] To

represents a continuation of the deradicalization of the NLRA. *See* Klare, *supra* note 220. For a further discussion on deradicalization, *see* Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984); Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985); Finkin, *Does Karl Klare Protest Too Much?*, 44 MD. L. REV. 1100 (1985); Klare, *Lost Opportunity: Some Concluding Thoughts of the Finkin Critique*, 44 MD. L. REV. 1111 (1985). As described by Klare, this deradicalization has occurred because, in its interpretation of the Wagner Act, the Court has repeatedly favored the purposes of the Act which are consistent with liberal capitalism and ignored the Act's more radical purposes. Klare, *supra* note 220, at 292–93. This process of deradicalization is present in the Court's emphasis on contractualism in collective bargaining, the development of the "public right" doctrine in the enforcement of the NLRA, and the limitation on the protection of employee concerted activity. *Id.* at 293. The limitation on the protection of employee concerted activity was achieved by separating the concept of union activity from the concept of employee activity and by limiting the extent of "legitimate" union activity which the Act would protect. *Id.* at 320–21. In *Beck*, the Court once again ignored Congress's more radical purposes, focusing only on a limited purpose of promoting collective bargaining. This limited congressional purpose was then used to resolve a conflict in which the activity of the union was conceived of as separate from that of the employees, with a resulting limitation on the extent of union activity allowed under the NLRA. The conflict between the preservation of the rights of the collective and the "privileging" of the rights of the individual is a central theme of Critical Legal Studies literature. *See generally* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). The only distinctions between *Beck* and the examples cited by Klare are that in *Beck* the Court has directly limited the purposes of the NLRA it will consider rather than obscuring this limitation in a discussion of doctrine, and that in *Beck* the Court has undertaken the process of deradicalizing the Taft-Hartley Act as well as the Wagner Act.

[291] When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

Crowell v. Benson, 285 U.S. 22, 62 (1935); *see also* St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 780 (1981); United States v. Rumley, 345 U.S. 41, 45 (1952) (Frankfurter, J.); Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring); Lucas v. Alexander, 279 U.S. 573, 577 (1929); Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 346 (1928); Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring). Some judges and commentators view this doctrine as a canon of statutory construction. *Ashwander*, 297 U.S. at 346–48 (Brandeis, J., concurring); W. ESKRIDGE & P. FRICKEY, *supra* note 24, at 676. However, the doctrine seems more properly viewed as a doctrine of constitutional adjudication, since to apply the doctrine the court must construe the Constitution at least to the extent of determining whether there is a serious constitutional question and how to avoid it. *See infra* note 330. Some respected justices and judges agree. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting); *Rumley*, 345 U.S. 41, 45 (1953) (Frankfurter, J.); United States v. Lovett, 328 U.S. 303, 319–20 (1946) (Frankfurter, J., concurring); H. FRIENDLY, BENCHMARKS 210–11 (1967). Also, treating the doctrine as one of statutory interpretation rather than constitutional adjudication can result in the needless frustration of congressional intent and inequity in the treatment of people affected by different statutes. *See infra* note 309 and accompanying text.

limit this doctrine, the Court has admonished itself not to "press statutory constructions 'to the point of disingenuous evasion' even to avoid a constitutional question."[292]

Two rationales have been put forth to support this doctrine. First, where alternatives exist, Congress will not choose to enact a statute that raises a serious constitutional question for fear the statute will inadvertently trample constitutional rights and turn out to be merely a wasteful legislative exercise when it is struck down by the courts.[293] Second, the unelected judiciary should minimize its intrusion on the power of the elected Congress by declining to invoke its constitutional power of legislative review.[294] The first rationale sets up a presumption as to what Congress might have intended the statute to say. The second constitutes a directive, arguably contained in the Constitution, to choose an interpretation which avoids the constitutional question despite a certain amount of evidence suggesting that the statute has raised the question. If accepted, these rationales can justify either a modest application of the doctrine—that among equally likely interpretations of a statute, one of which raises the constitutional question and one of which does not, a court should select the one which avoids the question;[295] or a more radical application—that the doctrine effectively countermands some positive evidence which suggests an interpretation that raises the constitutional question.[296]

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[292] United States v. Lock, 471 U.S. 84, 96 (1985) (quoting George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933)).

[293] W. ESKRIDGE & P. FRICKEY, *supra* note 24, at 676.

[294] Ashwander v. TVA, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring); Posner, *supra* note 25, at 815.

[295] The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. *Even to avoid a serious doubt the rule is the same.*

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937) (emphasis added).

[296] "This rule of Constitutional adjudication is normally invoked to narrow what would otherwise be the natural but constitutionally dubious scope of the language." Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 477 (1957) (Frankfurter, J., dissenting); *see also* Association of Salaried Employees v. Westinghouse Elec. Corp., 348 U.S. 437, 453 (1955), *overruled on other grounds*; Smith v. Evening News Ass'n, 371 U.S. 195 (1962); H. FRIENDLY, *supra* note 291, at 210. The doctrine of construing statutes to avoid constitutional questions should be distinguished from the doctrine of construing statutes, where possible, to avoid unconstitutionality. Under the doctrine of avoiding constitutional questions, the court determines whether a likely interpretation of the statute raises a serious constitutional question, and then fairly construes the statute to avoid the question. Under the doctrine of avoiding unconstitutionality, the court determines whether a likely interpretation of the statute violates the Constitution, and then

Despite its protests to the contrary,[297] there is strong evidence that the doctrine of avoiding constitutional questions lurks just below the surface of the court's interpretation of section 2 Eleventh in *Street*. The Court cited and discussed the doctrine at length as a preface to its interpretation of section 2 Eleventh.[298] There seems no doubt that the Court's interpretation of section 2 Eleventh varies greatly from the ordinary interpretation of that statute.[299] The Court itself has admitted that its interpretation of section 2 Eleventh is "not without difficulties,"[300] while individual justices and commentators have described the Court's interpretation as "strained" and even "tortured."[301] Moreover, the Court's interpretation, allowing variation in the amount of dues that can be charged employees based on individual dissent,

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construes the statute so that it is constitutional. Posner, *supra* note 25, at 814. The benefits of actually deciding the constitutional question are discussed below. *See infra* note 325. The rationale of avoiding unconstitutionality is similar to the first rationale of avoiding constitutional questions. *Lincoln Mills*, 353 U.S. at 477 (Frankfurter, J., dissenting) (Congress would not intentionally enact an unconstitutional statute); Posner, *supra* note 25, at 814–15 (Congress prefers that courts not nullify its efforts). As with the doctrine of avoiding constitutional questions, this rationale will support either a modest "tip the scales" application or a more radical "countermanding" application. *See Jones & Laughlin Steel Corp.*, 301 U.S. at 30 (1937) ("tip the scales" application); United States v. Johnson, 323 U.S. 273, 276 (1944); H. FRIENDLY, *supra* note 291, at 210 (application where doctrine countermands intrinsic and extrinsic evidence).

[297] In *Street* the Court maintained that its interpretation of section 2 Eleventh was "reasonable," intimating that it was more than "fairly possible" and thus did not rely on the doctrine of avoiding constitutional questions. *Street*, 367 U.S. at 750. The Court repeated this claim in *Beck*. 108 S. Ct. at 2657.

[298] International Ass'n of Machinists v. Street, 367 U.S. 740, 749–50 (1961).

[299] The Supreme Court has recognized that, contrary to its interpretation, an ordinary interpretation of the language and legislative history of section 2 Eleventh suggests that it allows the full observance of agency shop agreements. Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435, 445 (1984).

[300] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 232 (1977). The *Abood* Court stated that the *Street* interpretation of the Railway Labor Act was embraced "precisely to avoid facing the constitutional issues presented by the use of union shop dues for political and ideological purposes unrelated to collective bargaining." *Id.* at 232 (citations omitted).

[301] *Abood*, 431 U.S. at 248 (Powell, J., concurring). Cantor, *supra* note 20, at 67–68, 72; Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 RUTGERS L. REV. 3, 9 (1983); Read, *supra* note 57, at 256; Recent Development, *Union Shop Provision of the Railway Labor Act Held Not to Authorize Use of Union Dues for Political Purposes*, 61 COLUM. L. REV. 1513, 1517 (1961) [hereinafter Note, *Union Shop Provision*]. Justice Black, in his dissent in *Street*, said that "no one has suggested that the Court's statutory construction of [section] 2, Eleventh could possibly be supported without the crutch of its fear of unconstitutionality." *Street*, 367 U.S. at 786. Similarly, Justices Frankfurter and Harlan pointed out in their dissent in *Street* that the Court's interpretation of section 2 Eleventh deviated so far from an ordinary reading of the statute's language and legislative history that none of the parties to the case had urged that reading before the Court. *Id.* at 803. *See also Ellis*, 466 U.S. at 445–46; NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979); *Street*, 367 U.S. at 786 (Black, J. dissenting).

smacks of constitutional remedy rather than statutory interpretation. Indeed, the Court's interpretation of section 2 Eleventh is very similar to the remedy that was found constitutionally required for the public sector in *Abood*.[302] It strains credulity to argue that this peculiar interpretation avoids the constitutional question merely by fortunate coincidence. Dissenting justices, commentators, and even the Court itself have recognized that the reason for the Court's strained interpretation of section 2 Eleventh was the Court's desire to avoid the constitutional question.[303]

The Court's imposition of the *Street* interpretation on section 8(a)(3) in *Beck* might still be justified if *Street* were an appropriate exercise of the doctrine of avoiding constitutional questions, and if there were important statutory reasons for interpreting sections 8(a)(3) and 2 Eleventh the same way. Regardless of the appropriateness of the Court's decision in *Street*,[304] there is no reason to interpret these sections identically. Although the legislative history of section 2 Eleventh suggests that Congress intended to allow the same forms of union security agreements under the RLA as were allowed under section 8(a)(3), Congress's only expressed purpose for this uniformity was extension of the benefits of a system that was working well under the NLRA.[305] Neither the Court nor the plaintiffs in *Beck* expressed any policy reason for interpreting section 8(a)(3) and section 2 Eleventh the same. Indeed, even after *Beck*, the extent of union security agreements allowed under the NLRA and the RLA differs in states that have prohibited union security agreements under section 14(b) of the NLRA,[306] since such prohibition is pre-empted for agreements governed by the RLA.[307] For the purpose of consistency it is desirable that similar statutes be

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[302] *Abood*, 431 U.S. at 235–36.

[303] "*Street* embraced an interpretation of the Railway Labor Act not without its difficulties precisely to avoid facing the constitutional issues presented by the use of union shop dues for political and ideological purposes unrelated to collective bargaining." *Abood*, 431 U.S. at 232 (citations omitted); *see also* Ellis v. Brotherhood of Ry. Clerks, 466 U.S. at 445–46 (1984); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979); *Street*, 367 U.S. at 786 (Black, J., dissenting); Cantor, *supra* note 20, at 67–68; Note, *Union Shop Provision*, *supra* note 301, at 1517.

[304] The Court's opinion in *Street* is subject to many of the objections to the application of the doctrine of avoiding constitutional questions raised by *Beck*. *See* Cantor, *supra* note 20, 70–75; *see also infra* text accompanying notes 310–336.

[305] *Beck*, 108 S. Ct. at 2649 (quoting 96 CONG. REC. 17055 (1951) (remarks of Rep. Brown)).

[306] 29 U.S.C. § 164(b) (1982).

[307] 45 U.S.C. § 152 Eleventh (1982).

interpreted the same by the courts. However, where one statute's language and purpose has been attenuated due to constitutional concerns, such consistent interpretation serves only to frustrate legislative intent when these concerns are absent from the second statute.

The Court's imposition of the *Street* interpretation on section 8(a)(3) in *Beck* might also be justified if that interpretation were an appropriate exercise of the doctrine of avoiding constitutional questions with respect to section 8(a)(3). In fact, the Court's opinion in *Beck* is perhaps best understood as an application of the doctrine of avoiding constitutional questions as a doctrine of statutory interpretation rather than constitutional adjucation.[308] The Court's *constitutional* concerns about union security agreements under the RLA molded its interpretation of section 2 Eleventh in *Street*. That interpretation was then treated as a reasonable *statutory* interpretation and controlling extrinsic evidence in the interpretation of section 8(a)(3) in *Beck*. As evidenced in the *Beck* decision, the mistake in treating an application of the doctrine as one of statutory interpretation rather than constitutional adjudication is that there is no examination of whether the case at hand raises the same constitutional concerns.[309] Without such an examination, the Court may defeat the legislative intent of a statute without constitutional justification.

B. *Can* Beck *Be Justified as an Application of the Doctrine of Avoiding Constitutional Questions?*

To determine whether the *Beck* decision can be justified as an appropriate application of the doctrine of avoiding constitu-

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[308] *See supra* note 291.

[309] Treating the doctrine as one of statutory interpretation also can cause inequitable treatment of people affected by different laws due to the dynamic nature of constitutional interpretation. W. ESKRIDGE & P. FRICKEY, *supra* note 24, at 687–88. For example, the Court may avoid a constitutional question by restrictively interpreting a statutory right or power, and then find no constitutional infirmity with the right or power when forced to answer the constitutional question under a different statute. If the interpretation of the first statute is viewed as statutory and thus does not evolve with the constitutionally-based decision, people affected by the first statute will be governed by a different constitutional standard than people affected by the second statute. Justice Black noted this problem in discussing the inequity in the different treatment afforded statutory union security rights and integrated state bars. *Street*, 387 U.S. at 785 (Black, J., dissenting). Apparently this inequity continues to this day. *See* Levine v. Heffernan, 864 F.2d 457 (7th Cir. 1989) (compelled bar membership does not violate the first amendment). One might argue that the aggrieved parties need only return to Congress and seek amendment of the relevant statute under the new constitutional standard. However, in most cases the problems and costs of returning to Congress to re-enact a negated statute will be significant or perhaps even prohibitive.

tional questions, we must first examine whether agency shop agreements under the NLRA raise a serious constitutional question.[310] Although this question seems similar to the question avoided in *Street*, the underlying constitutional concerns are quite different. In *Street* the existence of state action in the negotiation of the agency shop agreement had been established by the Court's decision in *Hanson*.[311] The underlying constitutional concern was whether, given state action, charging dissenting employees for political expenses violated their first amendment rights. The legitimacy of this concern was verified by the Court's decision in *Abood v. Detroit Board of Education*.[312] Under the NLRA, the constitutional concern is whether there is state action in the negotiation and observance of an agency shop agreement.[313]

There seems no serious question as to the constitutionality of agency shop agreements under the NLRA. Although the Court once may have entertained notions that a union's activities as exclusive representative constituted state action,[314] the Court's conception of state action has since narrowed so that this is no longer a real possibility. The Court now requires substantial grants of government authority or direct government coercion in promoting the activity in question to elevate a private party's actions to state action. No such grant of authority or coercion can be found in the NLRA.[315] *Hanson* cannot act as precedent on the question of state action under the NLRA because its finding of state action is based on section 2 Eleventh's pre-emption of contrary state laws.[316] The NLRA does not pre-empt state laws prohibiting union security agreements.[317] *Abood* cannot act as precedent for state action under the NLRA because it was a public sector case.[318] Even Justices Brennan and Marshall, who retain a broad vision of the state action doctrine,[319] seem to have abandoned the idea that the union's actions as

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[310] *See infra* notes 337–339 and accompanying text.

[311] Railway Employees Dep't v. Hanson, 351 U.S. 225, 232 n.4 (1956); Wellington, *supra* note 57, at 354–59.

[312] 431 U.S. 209, 232–37 (1977).

[313] *See infra* notes 337–345 and accompanying text.

[314] Steele v. Louisville & N.R.R. Co., 323 U.S. 192, 198–99 (1944).

[315] *See infra* notes 388–399 and accompanying text.

[316] Railway Employees' Dep't. v. Hanson, 351 U.S. 225, 232 (1956).

[317] 29 U.S.C. § 164(b) (1982).

[318] *See infra* notes 340–343 and accompanying text.

[319] San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522, 548–60 (1987) (Brennan, J., dissenting); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 365–74 (1974) (Marshall, J., dissenting).

exclusive representative constitute state action.[320] With no real prospect for establishing the prerequisite state action, there is no serious question concerning the constitutionality of agency shop agreements under the NLRA.

The second question to consider is whether the Court's interpretation of section 8(a)(3) in *Beck* constitutes a "fair" interpretation or a "disingenuous evasion."[321] This inquiry is a subjective matter. However, it may be fruitful to examine the majority's interpretation in light of the rationales of the doctrine of avoiding constitutional questions.[322] If the Court's interpretation of section 8(a)(3) cannot be supported by these rationales, then it cannot be an appropriate application of the doctrine of avoiding constitutional questions.

It would indeed seem disingenuous to justify the Court's opinion on the basis of a general presumption that Congress avoids constitutional questions. The language and legislative history of section 8(a)(3) plainly allow the negotiation of an agency shop, overcoming any possible presumption. Moreover, the legislative history of the NLRA establishes that Congress enacted the statute with full knowledge that it raised many constitutional questions, including whether union security agreements violate dissenting employees' first amendment rights.[323] The passage of

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[320] In Justice Brennan's opinion for the majority in United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979), he stated in dicta that a union's collective agreement "does not involve state action." *Id.* at 200. Similarly, Justice Marshall wrote the Court's opinion in United Steelworkers of Am. v. Sadlowski, 457 U.S. 102 (1982), which held that a union's internal rules governing the procedures of its elections were not state action. *Id.* at 121 n.16.

[321] *See supra* note 292 and accompanying text.

[322] *See supra* notes 293–296 and accompanying text.

[323] The opponents of the Wagner Act raised a host of constitutional objections to its enactment. Their primary objection was that the regulation of labor relations exceeded Congress's power under the Commerce Clause. *1934 Senate Hearings*, *supra* note 117, at 390–94, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 424–48 (statement of James H. Emery, General Counsel of the National Association of Manufacturers). *See also 1935 Senate Hearings*, *supra* note 215, at 243–53, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1629–39 (statement of Mr. Emery); *1934 Senate Hearings*, at 692–94, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 730–32 (statement of Wagner Fisher, an employer); NATIONAL LAWYERS' COMMITTEE OF THE AMERICAN LIBERTY LEAGUE, REPORT ON THE CONSTITUTIONALITY OF THE NATIONAL LABOR RELATIONS ACT (1935), *reprinted in Amendments to the National Labor Relations Act: Hearings Before the House Comm. on Labor*, 76th Cong., 1st Sess. 2242–45 (1939) [hereinafter REPORT ON THE CONSTITUTIONALITY OF THE NLRA]. This argument was based soundly on the precedents of the Court. *See, e.g.*, United Mine Workers v. Coronado Coal Co., 259 U.S. 344 (1922); Hammer v. Dagenhart, 247 U.S. 251 (1918). The opponents also argued that the Act violated (1) the employer's fifth amendment due process rights because the prohibited unfair labor practices were vague and interfered with the employer's freedom of contract in prohibiting anti-union discrimination; (2) the fourth, fifth, and seventh amendments, and article

the Wagner Act represented the pinnacle of an historic conflict between the legislative aspirations of the New Deal Congress and the constitutional interpretations of the pre-New Deal Court.[324] It would therefore seem inappropriate to interpret the NLRA on the presumption that Congress shied away from constitutional controversy in its enactment.[325]

III, by delegating responsibilities of the courts to the NLRB; and (3) the employee's first and fifth amendment rights by designating the union as the exclusive representative and allowing union security agreements. *1934 Senate Hearings*, *supra* note 117, at 397–400, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 431–34 (statement of Mr. Emery); *see also 1935 Senate Hearings*, *supra* note 117, at 244, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 1630 (statement of Mr. Emery); *1934 Senate Hearings*, *supra* note 117, at 690–91, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 728–29 (statement of Mr. Fisher); *1934 Senate Hearings*, *supra* note 117, at 762–64, *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 800–02 (statement of Earnest T. Weir, Chairman of National Steel Corp.); 79 CONG. REC. at 7677–80 (1935) *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2403–11 (remarks of Sen. Hastings (R-Del.)); REPORT ON THE CONSTITUTIONALITY OF THE NLRA, *supra* at 2242–45. Senator Hastings commented that one did not need to be a "constitutional lawyer" but merely a "law student to reach the conclusion that the proposed act is unconstitutional." 79 CONG. REC. 7676 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2403. These arguments also had some support in the decisions of the Court. *See, e.g.*, Adair v. United States, 208 U.S. 161 (1908) (statute outlawing employer discrimination against union members violates fifth amendment).

[324] Approximately one month prior to the final passage of the Wagner Act, the Supreme Court struck down the National Industrial Recovery Act of 1933, 48 Stat. 19, in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Court believed that NIRA's codes of fair competition, which included the right to select exclusive representatives and to bargain collectively, exceeded Congress's power under the Commerce Clause. *Id.* at 548–50. Congress was then inundated with a "barrage" of letters and opinions from employers and their counsel that the Wagner Act was unconstitutional and should be abandoned. 79 CONG. REC. 8540 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3011–12 (remarks of Rep. Connery (D-Mass.)). After the enactment of the Wagner Act, employer resistance and disregard for the Act was widespread because of its presumed unconstitutionality. Maden, *The Origin and Early History of the National Labor Relations Board*, 29 GEO. WASH. L. REV. 234, 242–46 (1960); DEVELOPING LABOR LAW, *supra* note 160, at 30–31. The Supreme Court finally ended the controversy in NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), finding that the Wagner Act was a lawful exercise of Commerce Clause power without violating article III or employer fifth or seventh amendment rights. The *Jones & Laughlin* decision is recognized as the turning point in the Court's interpretation of congressional Commerce Clause power from its previously restrictive view. Stern, *The Commerce Clause and the National Economy*, 59 HARV. L. REV. 645, 674–85 (1946). The decision, along with its companion decision of similar issues under the RLA, Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515 (1937), is significant also with respect to the delineation of employer fifth and seventh amendment rights.

[325] Judge Friendly has taken issue with the doctrine's rationale that Congress generally shies away from enacting statutes that raise constitutional questions. H. FRIENDLY, *supra* note 291, at 210. The Judge has argued that Congress has little reason to avoid questions of constitutionality since they are usually resolved in the Congress's favor and, even if they are not, the Court will salvage any constitutional portion of the statute by applying the doctrine of avoiding unconstitutionality. *Id.*; *see supra* note 296 and accompanying text. The Judge puzzles as to why Congress would avoid such a "heads-I-win, tails-you-lose" situation. H. FRIENDLY, *supra* note 291, at 210. One response is that Congress abhors forcing people to suffer the temporary deprivation of rights and

The Court's interpretation of section 8(a)(3) in *Beck* is also inconsistent with the doctrine's rationale of minimizing the Court's intrusion into the powers of the elected legislature. Traditionally, the Court describes the broad outlines of permissible legislation while Congress specifies a statute's precise policy and form.[326] When the Court interprets a statute to avoid a constitutional question, at least the initial determination of the law's policy and form is shifted away from Congress and to the Court. Where a possible constitutional problem admits to only one solution with little need of specification or where Congress can easily amend the statute, this initial determination poses a small intrusion into the domain of the legislature. In *Beck*, however, the Court chose one among several possible legislative solutions.[327] The solution chosen requires a great deal of specification as to what expenses a union may charge dissenters, the necessary union bookkeeping procedures, and the allowable fee reduction plans.[328] Moreover, given employers' desire and recent ability to resist reform of the NLRA,[329] the Court's choice of policy and form in this instance is likely to prevail for some time. Thus, the Court's opinion in *Beck* not only impinges on the role of the legislature, it usurps that role in its entirety.[330]

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expense involved in redressing their constitutional rights through the courts. This argument, however, is insufficient to support the general presumption of avoidance. It seems just as likely to Judge Friendly that Congress would enact what it viewed as reasonable legislation and leave it to the courts to determine the finer points of constitutional law. *Id.* Judge Friendly argues that considering the constitutional question is "very likely just what Congress thinks the Justices are paid to do." *Id.* Indeed, it may be part of a legislative compromise to defer questions of constitutionality to the courts. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533, 544–46 (1983).

[326] *See* Hatch, *supra* note 145, at 894.

[327] In response to a finding of constitutional infirmity, Congress could have (1) limited the collection of dissenters' dues to collective bargaining expenses, as the Court did; (2) limited the collection of dissenters' dues to non-political and non-ideological expenses, the constitutional line for the compulsion of dues; (3) omitted the compulsion of political or ideological contributions from the exclusive domain of the union, thereby avoiding state action in the negotiation of union security agreements; or (4) required agency fee payments like those in solutions (1) or (2) for any bargaining units in which a majority of employees voted for a union security agreement. In fact there was some sentiment to require union security agreements upon a vote of the employees during the enactment of the Taft-Hartley Act. Amendment to S. 1126 by Sen. Malone, 93 CONG. REC. 5077 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 112, at 1400 (requiring employers to adopt a union shop on three-fourths vote of employees).

[328] *See, e.g.*, Ellis v. Brotherhood of Ry. Clerks, 466 U.S. 435 (1984); Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113 (1963).

[329] This ability is evidenced in the demise of the Labor Law Reform Act of 1977, H.R. 8410, 95th Cong., 1st Sess. (1977). *See Filibuster v. U.S. Labor Law Reform Bill*, 34 CONG. Q. ALMANAC 284 (1978); *see also* DEVELOPING LABOR LAW, *supra* note 160, at 66–67.

[330] A sound argument can be made that the doctrine's rationale of avoiding constitu-

The rationales of the doctrine also suggest that in interpreting the statute to avoid the constitutional question, the Court should do the least possible harm to the legislature's intent. The Court should not rely on a presumption of congressional avoidance of constitutional questions in the face of contrary expressions of legislative intent any further than necessary to avoid the constitutional question. Moreover, if the rationale of the doctrine is to minimize the incursion of the judiciary into the power of the legislative, that rationale itself requires a minimalist application. Properly applied, the doctrine requires more than a search for a superficially plausible interpretation which avoids constitutional questions; it requires an endeavor to give the fullest expression to legislative intent subject to avoidance of the constitutional question.

The Court's decision in *Beck* is not a proper application of the doctrine of avoiding constitutional questions because the Court could have interpreted section 9(a) of the NLRA to avoid the constitutional question without frustrating Congress's intent to allow the observance of agency shop agreements under section 8(a)(3). The Court could have concluded that although agency shop agreements are allowed by section 8(a)(3), the

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tional questions to restrain judicial power is fallacious. The application of the doctrine does not avoid constitutional interpretation or exercise of judicial power. To apply the doctrine the Court must interpret the Constitution to determine whether a serious constitutional question exists. Justice Frankfurter and Judge Friendly, among others, perceived this, recognizing the doctrine as one of constitutional adjudication. H. FRIENDLY, *supra* note 291, at 211. Moreover, this determination is used in the same way as a determination of superficial unconstitutionality is used under the doctrine of avoiding unconstitutionality, *see supra* note 296, to choose among equally likely interpretations or to amend the interpretation away from unconstitutionality. The only saving afforded by the doctrine is an exact determination of the constitutional rights or limitations in question.

Judge Posner has pointed out that by retaining uncertainty as to what the constitution says, the application of the doctrine of avoiding constitutional questions creates a "judge-made 'penumbra'" around the Constitution, exaggerating its prohibitory effect and enlarging rather than diminishing the Court's exercise of judicial power. Posner, *supra* note 25, at 816. He recommends the abandonment of the doctrine in favor of application of the doctrine of avoiding unconstitutionality because the latter doctrine achieves the benefits of avoiding superficial unconstitutionality without expanding the prohibitory reach of the Constitution. *Id.*

However, it is the treatment of the doctrine as one of statutory interpretation rather than the penumbra of uncertainty which caused the needless erosion of unions' statutory rights in *Beck*. Had the Court in *Beck* recognized the application of the doctrine of avoiding constitutional questions in *Street*, treated the doctrine as one of constitutional adjudication, and examined whether it was appropriate to apply the doctrine in *Beck*, the Court would have decided against application of the doctrine and interpreted section 8(a)(3) to allow agency shop agreements. Thus, if the Court had properly acknowledged and applied the doctrine, Professor Posner's penumbra of uncertainty would never have come into play.

payment of fees for non-collective bargaining purposes as a condition of employment is not within the definition of "rates of pay, wages, hours of employment, or other conditions of employment" under section 9(a) of the NLRA.[331] As a result, while the negotiation of union security agreements would remain a mandatory subject of bargaining over which the union was the exclusive representative, the extension of such agreements to payments for non-collective bargaining purposes would be a permissive subject on which individual bargaining was possible.[332] Because the union would not be the exclusive representative with respect to the negotiation of fees for non-collective bargaining expenses, there would be no colorable argument of state action or constitutional violation. This interpretation of section 9(a) is at least as plausible as the Court's interpretation of section 8(a)(3) in *Beck*. The plain language of section 9(a) does not include such payments, and it takes no greater perversion of legislative history to exclude them from the coverage of section 9(a) than it does from the coverage of section 8(a)(3).[333] Indeed, unless the Court would require employers to bargain over agency shop agreements which cannot be observed or enforced under section 8(a)(3), its interpretation of section 8(a)(3) in *Beck* requires a similar interpretation of section 9(a).

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[331] 29 U.S.C. § 159(a) (1982).

[332] The employer's duty not to bargain with individuals extends only to subjects delineated in section 9(a) of the NLRA. J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944); Allied Chem. Co. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 164 (1971); R. Gorman, *supra* note 2, at 380.

[333] The legislative history of section 9(a) reveals that the principle of exclusive representation was meant to encompass all subjects of collective bargaining, including union security. The Senate Report on the Act noted:

> Majority rule carries the clear implication that the employers shall not interfere with the practical application of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all. But majority rule, it must be noted, does not imply that any employee can be required to join a union, *except through the traditional method of a closed-shop agreement, made with the assent of the employer.*

S. REP. NO. 573, 74th Cong., 1st Sess. 13 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2300, 2313 (emphasis added); *see also* H.R. REP. NO. 1147, 74th Cong., 1st Sess. 20–21 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 3046, 3070–71 (majoritarian principle of § 9(a) permits, but does not automatically establish, closed shop); *1935 House Hearings*, *supra* note 215, at 16–17, *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2490–91 (statement of Sen. Wagner (D-N.Y.) that closed shop may only be established by agreement between employer and § 9(a) representative). However, the legislative history is silent on the exact extent of the exclusive representative's authority on union security agreements, leaving room for the manuevers of a creative court.

The practical effect of this interpretation of section 9(a) on the legislative scheme for union security agreements under the NLRA would be miniscule: to avoid making the fine distinctions between collective and non-collective bargaining expenses and to avoid engaging in individual bargaining, private employers probably would choose to negotiate the traditional agency shop agreements envisioned by the Act.

Finally, the doctrine of avoiding constitutional questions should not be applied to avoid a question which will soon have to be answered in another case. The Court will soon be asked to decide whether union security agreements under the NLRA are subject to the same procedural protections of dissenters' rights that the Court found constitutionally mandated for the public sector in *Chicago Teachers Union, Local No. 1 v. Hudson*.[334] Since the language of section 8(a)(3) and its legislative history admit to no such procedural protections,[335] the Court should finally decide whether agency shop agreements under the NLRA are subject to constitutional scrutiny. Any delay in answering this constitutional question gained by the Court's decision in *Beck* seems pointless.

Thus, the Court's interpretation of section 8(a)(3) in *Beck* would not be an appropriate application of the doctrine of avoiding constitutional questions. There is no serious constitutional question to avoid and the Court's interpretation would seem to "[carry] the doctrine . . . to a wholly unjustifiable extreme"[336] because the rationales of the doctrine do not support the interpretation. Moreover, any avoidance of the constitutional question in *Beck* seems futile because the Court will soon have to address the same constitutional question in deciding whether to extend *Hudson* to union security agreements covered by the NLRA. As a result, the doctrine of avoiding constitutional questions cannot justify the Court's deviation in its interpretation of

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[334] 475 U.S. 292 (1986).

[335] *See supra* text accompanying notes 148–278. To interpret such procedural restrictions into the language of section 8(a)(3) would seem particularly at odds with Congress's desire for unobtrusive regulation of union security agreements which does not impinge on union internal affairs. *See supra* notes 251, 254.

[336] International Ass'n of Machinists v. Street, 367 U.S. 740, 784 (1961) (Black, J. dissenting) (quoting Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 213 (1960) (Black, J., dissenting)); Note, *Union Shop Provision*, *supra* note 301, at 1517; Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUP. CT. REV. 49, 73. Although these sources refer to the Court's interpretation of section 2 Eleventh in *Street*, they are equally applicable to the extension of that interpretation to section 8(a)(3) in *Beck*.

section 8(a)(3) from Congress's intent, as represented in the statute's words, administrative interpretations, and legislative history.

IV. The Question Left Unanswered: Does the Negotiation and Voluntary Observance of Union Security Agreements Under the NLRA Constitute State Action?

As discussed at the outset of this Article, the *Beck* case involved two questions: whether section 8(a)(3) allows the negotiation and observance of agency shop agreements and, if so, whether such negotiation and observance violates dissenting employees' first amendment rights. The Court's determination that section 8(a)(3) did not allow agency shop agreements precluded the Court's consideration of the constitutional question. However, since I conclude in my analysis that the Court should have interpreted section 8(a)(3) to allow agency shop agreements, it is appropriate to proceed to an examination of the constitutional question.

In order to determine whether agency shop agreements under the NLRA violate dissenting employees' first amendment rights, one has to examine three questions. The first is whether the union's or employer's activity in negotiating and observing the agreement constitutes "state action."[337] If state action is found, the inquiry proceeds to the question of whether compulsory financial support for a union infringes upon dissenters' first amendment rights.[338] Finally, one must examine whether any state infringement which does occur can be justified by a compelling state interest and whether the state's activity is as narrow as possible to avoid the infringement of the dissenters' first amendment rights.[339] If there is insufficient state interest or

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[337] *See* Hudgens v. NLRB, 424 U.S. 507, 513 (1976).

[338] This question is not as simple as it might first appear. Professor Cantor has analogized a union's use of dissenters' dues, even for political purposes, to the government's use of tax revenue for programs or the expression of ideas ideologically offensive to the taxpayer. Based on this analogy, Professor Cantor argues that even if there is state action in the negotiation and observance of an agency shop agreement, such an agreement does not infringe upon dissenting employees' first amendment rights. Cantor, *supra* note 20, at 70–71. *But see* Gaebler, *First Amendment Protection Against Government Compelled Expression and Association*, 23 B.C.L. Rev. 995, 1003–06 (1982).

[339] *See* L. Tribe, *supra* note 31, § 12-23.

unnecessarily broad state action, a first amendment violation has been established.

The Court has decided the last two of these questions in *Abood v. Detroit Board of Education*.[340] There the Court held that compulsory financial support of union activities does infringe upon dissenters' first amendment rights.[341] Although the Court found sufficient state interests to justify such infringement in the case of collective bargaining expenses, it found no such justification in the case of compulsory financial support of union political activities.[342] However, *Abood* was a public sector case, not governed by the NLRA, which raised no serious question as to state action.[343] Similarly, the existing precedent holding that the negotiation and observance of a union security agreement under the RLA constitutes state action is easily distinguishable from the problem posed under the NLRA.[344] Thus, the question that remains unanswered is whether the negotiation and observance of an agency shop agreement under the NLRA constitutes state action.[345]

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[340] 431 U.S. 209 (1977).

[341] *Id.* at 234–35.

[342] *Id.* at 222, 234–36. The Court read Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956), as establishing that compulsory financial support of a union did infringe on dissenters' first amendment rights, yet was justified in the case of collective bargaining expenses by the state's interest in a system of labor relations based on collective bargaining. *Abood*, 431 U.S. at 222. This reading of *Hanson*, however, is far from obvious. An equally plausible reading of *Hanson* is that the Court found that the compulsory financial support of a union does not infringe on dissenters' first amendment rights. *See Hanson*, 351 U.S. at 238.

[343] In the public sector the government employer's agreement to the union security provision clearly satisfies the state action requirement. The issue was not even discussed in *Abood*.

[344] The basis of the Supreme Court's finding of state action under the RLA in *Hanson* was the exercise of the Supremacy Clause in section 2 Eleventh. *Hanson*, 351 U.S. at 232. There is no such exercise of the Supremacy Clause in section 8(a)(3) of the NLRA. 29 U.S.C. § 164(b) (1982).

[345] Another question which remains open is whether court enforcement of a union security agreement provides the state action necessary to give rise to a constitutional violation. *See* Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenant is state action). This question was not raised by the facts in *Beck*, since the employer had voluntarily complied with the union security agreement. The case was brought by dissenting employees who objected to this compliance. The fact that the vast majority of collective bargaining agreements rely in the first instance on private arbitration rather than on the courts for enforcement of the agreement's terms substantially decreases the importance of this question to determining the constitutionality of union security agreements. Moreover, the Court's opinion in *Shelley* has been subject to some criticism. *See, e.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 29–31 (1959). One might question the continuing validity of the opinion in light of the Court's recent narrowing of the scope of the state action doctrine. *See infra* note 355 and accompanying text. In this Article I will concern myself only with the question raised in *Beck*—whether the negotiation and private observance of a union security agreement constitute state action.

A. *The State Action Doctrine*

1. State Action—An Historical Perspective

The first amendment, like almost all of the Constitution's guarantees of individual rights, protects the individual only against *government* infringement.[346] A finding that the complained of activity constitutes "state action" is a prerequisite to any first amendment claim.[347] The restriction of the Constitution's protection to government action is both confining and liberating for the individual. Although other private parties need not respect a person's constitutional rights, the private person himself is not bound by constitutional standards in his dealings with other people. Thus, "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power."[348]

The concept of state action extends beyond the official acts of government officers and employees. The acts of an ostensibly private party may be state action if the party engages in a joint venture with the state or performs a public function with the authority of the state, or if the state coerces or significantly encourages the party's action.[349] The Supreme Court has not developed a unified test or doctrine to determine when ostensibly private activities constitute state action. Indeed, such a

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[346] L. TRIBE, *supra* note 31, § 18-1.

[347] *Id.*

[348] Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982). Another benefit or purpose of the limitation of the Constitution's protections to government action is that this limitation reinforces federalism and the separation of powers. The requirement does this by limiting the range of wrongs the federal judiciary can redress in the absence of valid congressional legislation, thus creating a zone of action which is reserved to the states unencumbered by federal supremacy. L. TRIBE, *supra* note 31, § 18-2.

[349] Robinson v. Florida, 378 U.S. 153 (1964) (state encouragement found where private restaurant owners segregated their restaurants pursuant to a state statute requiring separate toilet facilities for blacks); Lombard v. Louisiana, 373 U.S. 267 (1963) (decision of private store owners to have sit-in demonstrators arrested for trespass pursuant to state encouragement to use trespass laws in a discriminatory manner constitutes state action); Peterson v. City of Greenville, 373 U.S. 244 (1963) (state coercion found where private restaurant owners segregated their restaurants pursuant to state law); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (state action found in refusal by private coffee shop to serve blacks, because coffee shop was leasing space in a state facility, making the state and coffee shop joint venturers); Marsh v. Alabama, 326 U.S. 501 (1946) (company town that carried out all the public functions of a municipality subject to constitutional restraints); Smith v. Allwright, 321 U.S. 649 (1944) (state political primary held to be a government function delegated by state to private parties and thus subject to constitutional restraints).

test is probably impossible.[350] "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[351] However, if the focus of the Court's inquiry is capable of summary, it seems to be "whether there is a sufficiently close nexus between the State and the challenged action of the [private party] so that the action of the latter may be fairly treated as that of the State itself."[352]

The Court's willingness to define a private party's activities as state action has undoubtedly changed over time. Prior to World War II, the concept of state action remained largely limited to actions taken by formal governmental actors—the legislature, the executive, and the judiciary.[353] After the war, the simultaneous increase in the power of private entities, in the welfare state, and in the concern for civil rights led the Vinson and Warren Courts to expand the concept of state action to include an ever larger area of previously private activity.[354]

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[350] Professor Tribe asserts that a unified theory of state action is impossible under our current constitutional doctrine since the doctrine does not have an affirmative theory of individual liberty. Without an affirmative theory of individual liberty, he argues, it is impossible to distinguish when state inaction allowing private infringement of constitutional rights should be subject to constitutional standards. L. TRIBE, *supra* note 31, § 18-2. Professor Klare has argued that formulating any determinative test as to what constitutes state action is impossible since the distinction between public and private action is without determinative content. Klare, *supra* note 29, at 1415–21. The Court itself has acknowledged that "formulating an infallible test" of state action is "an 'impossible task.'" Reitman v. Mulkey, 387 U.S. 369, 378 (1967).

[351] Burton v. Wilmington Parking Auth., 365 U.S. at 722.

[352] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974).

[353] Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U.L.J. 683, 685–89 (1984). *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (fourteenth amendment only prohibits action taken directly by the state).

[354] Schneider, *State Action—Making Sense Out of Chaos—An Historical Approach*, 37 U. FLA. L. REV. 737, 739–43 (1985). *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944) (resolution of state Democratic convention excluding blacks from the Democratic primary constitutes state action, *overruling* Grovey v. Townsend, 295 U.S. 45 (1935)); Marsh v. Alabama, 326 U.S. 501 (1946) (decision of company town to have religious proselytizer arrested under trespass law constitutes state action); Terry v. Adams, 345 U.S. 461 (1953) (exclusion of blacks from voting in primary elections of political association constitutes state action); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (refusal by private coffee shop leasing space in state parking facility to serve blacks constitutes state action); Peterson v. City of Greenville, 373 U.S. 244 (1963) (segregation of restaurants by private restaurant owners pursuant to state law constitutes state action); Lombard v. Louisiana, 373 U.S. 267 (1963) (decision of private store owners to have sit-in demonstrators arrested for trespass pursuant to state encouragement to use trespass laws in a discriminatory manner constitutes state action); Robinson v. Florida, 378 U.S. 153 (1964) (segregation of restaurants by private restaurant owners pursuant to state statute requiring separate toilet facilities for blacks constitutes state action); Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (decision of private shopping mall to have union picketers arrested under trespass laws constitutes state action).

This expansion of the state action doctrine into the realm of ostensibly private activity has suffered a sharp reversal under the Burger and Rehnquist Courts.[355] This reversal has been accomplished largely without any change in the expressed state action doctrine, since none of the Vinson and Warren Courts' expansive holdings has been overturned. Instead, the contraction has been achieved through a significant narrowing of the relevant activity the Court will consider in determining whether there is state action.[356] The Court will no longer accept arguments for state action where the state's influence or involvement in the discriminatory activity is indirect, but instead requires actual coercion or direct involvement of the government in the challenged decision or act.[357] Thus, under the current Court, a nexus of actual state coercion or direct state interjection into the specific discriminatory act must exist in order to scrutinize the actions of a private party as those of the state.

2. State Action and Unions—An Historical Perspective

The argument that a union's negotiation and observance of a collective agreement constitutes state action has been raised in several contexts, but each time it has been avoided by the Court.

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[355] Schneider, *supra* note 354, at 739–43. The only major case since 1969 in which the Court has held that the actions of a private party were state action was Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (invocation of state prejudgment attachment procedure and aid of state officers by a private creditor constitute state action). That case was explicitly limited to its facts. *Id.* at 939 n.21. With the exception of *Lugar*, the Court has consistently found that the actions of a private party are not state action. *See, e.g.*, NCAA v. Tarkanian, 109 S. Ct. 454 (1988) (decision by an unincorporated association whose members consisted of both public and private universities and colleges which resulted in suspension of basketball coach of a state university does not constitute state action); San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987) (decision not to allow use of word "Olympic" by federal corporation with federal grant to exclusive use of the word does not constitute state action); Blum v. Yaretsky, 457 U.S. 991 (1982) (decision to discharge or transfer Medicaid recipients by committees of private doctors required, reviewed, and supported by federal government does not constitute state action); Rendel-Baker v. Kohn, 457 U.S. 830 (1982) (decision to discharge teacher by private school subject to state regulation and supported by state does not constitute state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (decision of state regulated public utility to discontinue service does not constitute state action); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (sale of goods by private warehousemen to recover debt pursuant to self-help provision of state law does not constitute state action); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (refusal to serve blacks by private dinner club with state liquor license does not constitute state action).

[356] Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, And A Proposal For Change*, 60 NOTRE DAME L. REV. 1150, 1156–57 (1985).

[357] *Id.*

First, in *Steele v. Louisville & Nashville Railroad*[358] the plaintiffs contended that the negotiation of a racially discriminatory collective agreement by the exclusive representative under the RLA violated black employees' fifth amendment rights. Perhaps foreshadowing the union security cases, the Supreme Court avoided this constitutional question by interpreting the RLA as imposing a statutory duty on the union to represent all employees in the bargaining unit fairly.[359] This duty of fair representation was violated by such discriminatory activity. Next, in *Railway Employees' Department v. Hanson*[360] the plaintiffs argued that there was state action in the negotiation of union security agreements under the RLA. Although state action was found in *Hanson*, it was based on Congress's exercise of the Supremacy Clause in section 2 Eleventh of the RLA to pre-empt inconsistent state laws, not on the union's role in negotiating the collective agreement.[361] Lastly, the plaintiffs in *Oliphant v. Brotherhood of Locomotive Firemen and Enginemen*[362] argued that a union's discriminatory exclusion of blacks from membership violated their fifth amendment rights. Although this issue never reached the Supreme Court, two lower courts held that there was no state action and thus no constitutional infringement in a union's discriminatory denial of membership.[363]

Despite the Court's avoidance of the issue, it has suggested rather strongly in dicta that it would not find that the union's role in negotiating and observing the collective agreement constitutes state action. Although the issue was not raised by the parties to the dispute, in *United Steelworkers of America v. Weber*,[364] the Court volunteered the observation that a collective

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[358] 323 U.S. 192 (1944).

[359] *Id.* at 198–99; *see also* Sayres v. Oil Workers Int'l Union, Local No. 23, 223 F.2d 739 (5th Cir. 1955), *rev'd*, 350 U.S. 892 (1955) (mem.) (parallel case to *Steele* dealing with a discriminatory collective agreement governed by the NLRA). This avoidance, to be sure, can be criticized on the basis that it expands, perhaps unevenly, the prohibitory effect of the Constitution. Yet the avoidance of the constitutional question in the case of the duty of fair representation seems more appropriate than in the case of union security agreements, since there seems to be no realistic legislative alternative and the question of whether a union's representation has been fair is one that is amenable to judicial determination.

[360] 351 U.S. 225 (1956).

[361] *Id.* at 232.

[362] 156 F. Supp. 89 (N.D. Ohio 1957), *aff'd*, 262 F.2d 359 (6th Cir. 1959), *cert. denied*, 359 U.S. 935 (1959).

[363] *Id.*; *but see* Betts v. Easley, 161 Kan. 459, 169 P.2d 831 (1946) (exclusive bargaining representative under RLA may not exclude members of the bargaining unit on the basis of race).

[364] 443 U.S. 193 (1979).

agreement "does not involve state action."[365] In *United Steelworkers of America v. Sadlowski*,[366] the Court, citing *Weber*, held that the union's internal rule prohibiting candidates for union office from accepting campaign contributions from nonmembers did not constitute state action.[367] Finally, in *Beck* both *Sadlowski* and *Weber* were cited in passing, although the resolution of the statutory question obviated the need to resolve the constitutional question. In a parenthetical phrase, *Weber* was cited for the proposition that "negotiation of a collective bargaining agreement's affirmative action plan does not involve state action."[368] If the Court really believes that *Weber* can be cited for the proposition that an affirmative action plan negotiated by an exclusive representative is not state action, then it would seem very difficult to argue successfully that a union security agreement negotiated by the exclusive representative is state action.[369]

The argument over whether a union's negotiation and observance of a collective agreement constitute state action is not merely of historical significance. In *Chicago Teachers Union, Local No. 1 v. Hudson*,[370] the Court held that in the public sector the protection of dissenters' first amendment rights requires that the union's procedure for accommodating dissenters under a union security agreement minimize the risk that dissenters' contributions might be used for impermissible purposes, provide adequate justification to dissenters for the remaining fee after any advance reduction in dues, and offer a reasonably prompt decision by an impartial decision-maker as to disputes over the allowable fee that can be charged dissenters.[371] It seems inevitable that some dissenting employees cov-

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[365] *Id.*

[366] 457 U.S. 102 (1982), *reh'g denied*, 459 U.S. 899 (1982).

[367] *Id.* at 121 n.16. The issue of whether a union's internal rules covering its voluntary members constitute state action is arguably distinguishable from the issue of whether its activities under section 9(a) affecting dissenting employees constitute state action.

[368] *Beck*, 108 S. Ct. at 2657.

[369] *See also* Black v. Cutter Laboratories, 351 U.S. 292, 298–99 (1956) (just cause provision in a collective bargaining agreement allowing discharge for Communist Party affiliation does not raise federal issue); American Communications Ass'n v. Douds, 339 U.S. 382, 402 (1950) (dicta, "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become government agencies or may be regulated as such."); *but see* Steele v. Louisville & N.R.R. Co., 323 U.S. 192, 208 (1944) (Murphy, J., concurring) (negotiation of discriminatory collective agreement by exclusive representative is state action).

[370] 475 U.S. 292 (1986).

[371] *Id.* at 304–09.

ered by a union security agreement under the NLRA will argue that without procedural safeguards equal to those outlined in *Hudson*, their interest in preventing the impermissible use of their contributions has not received adequate protection under the Constitution. The Court would then have several options: it could refuse to take the question, allowing possibly conflicting lower court opinions to stand; it could interpret section 8(a)(3) to include the procedural safeguards of *Hudson*, a feat from which I hope the Court would shrink;[372] or it could finally answer the question of whether there is sufficient state action in the negotiation and observance of a union security agreement under the NLRA to give rise to constitutional scrutiny.

There are two plausible arguments to support the contention that the negotiation and observance of a union security agreement by a union and private employer constitute state action. The first is that the union's designation as the exclusive bargaining representative under section 9(a) of the NLRA makes the union an arm of the state, subject to constitutional scrutiny in all of its activities as the exclusive representative. The second is that by promoting collective bargaining and shifting bargaining power to unions through various provisions of the NLRA, the federal government coerces or substantially encourages unions and employers to reach collective agreements containing terms favorable to unions—including union security agreements. I shall now consider each of these arguments.

B. *The Exclusive Representative as State Actor*

It is often asserted that the strongest argument for state action in the negotiation and observance of agency shop agreements lies in the designation of the union as the exclusive representative under section 9(a) of the NLRA.[373] When a union is elected the exclusive representative, it has the right to negotiate and enforce a collective bargaining agreement with the employer for all employees in the bargaining unit, including non-members

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[372] Of course, the words of section 8(a)(3) say nothing of any such procedures. The legislative history shows that Congress never considered any such procedure. In fact, Congress desired an unobtrusive solution to the problem of dissenting employees that would not interfere with the internal affairs of unions. *See supra* notes 251, 254.

[373] *See, e.g.*, Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1026 (1984).

and dissenters.[374] The employer, in turn, must bargain in good faith with the union to reach such an agreement.[375] The NLRA does not protect employee collective action which is independent of, or opposed to, the exclusive representative.[376] All individual employee contracts which are inconsistent with the collective agreement are superseded by it.[377]

Two arguments may be advanced as to how the designation of the union as the exclusive representative provides the necessary nexus between the state and the union's acts to make the latter state action. First, from the perspective of dissenting employees, the union is granted, over their opposition, a monopoly on the negotiation of their conditions of employment by operation of federal law.[378] It is argued that the exercise of this state grant of exclusive authority to bargain is state action. However, such a simple formulation of the problem ignores the fact that the union is elected by the employees and that even dissenters have an equal say in whether they are represented by a union.

A more sophisticated argument analogizes the elected union to an elected legislature, the employer to the executive, the negotiations between the union and the employer to the legislative process, and the collective agreement to legislation.[379] Under this scenario, unions and employers are performing a delegated government function in negotiating a collective agreement. Therefore, collective agreements—the "industrial legislation" of unions and employers—should be subject to constitutional restraints, just like the legislation of federal and state governments.[380]

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[374] Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

[375] 29 U.S.C. § 158(a)(5), (d) (1982).

[376] Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975) (black employees who picketed employer on their own, believing that their union did not adequately represent their interests, not protected by NLRA).

[377] J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

[378] Amicus Brief of Senators Jesse Helms (R-N.C.), Strom Thurmond (R-S.C.), Dan Quayle (R-Ind.), and Steven Symms (R-Idaho) at 16–17, *Beck*, 108 S. Ct. 2641.

[379] The Court itself has analogized collective bargaining to "industrial self-government." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960). *See also* Steele v. Louisville & N.R.R. Co., 323 U.S. 192, 198 (1944) (making a similar analogy to find a statutory duty of fair representation under the RLA); NLRB v. Allis-Chalmers Mfg., 388 U.S. 175, 180 (1967) (quoting *Steele* and drawing a similar analogy for the purposes of statutory interpretation under the NLRA).

[380] Symposium, *Individual Rights in Industrial Self-Government—A "State Action" Analysis*, 63 NW. U.L. REV. 4, 8–19 (1968). *Cf.*, Blumrosen, *Group Interests in Labor Law*, 13 RUTGERS L. REV. 432, 482–83 (1959).

This analogy, however, is tenuous. Employers make peculiar executives, since they are unelected, unimpeachable and, if unincorporated, thoroughly private. Should employers really be held to constitutional standards? Amending the argument to hold only unions to constitutional standards not only fractures the analogy, but forces us to deal with the fact that the union is not entirely responsible for the results of collective bargaining. Unlike "real" government, the union does not always have the power to impose contract terms on the other party to its agreements. Indeed, it has been persuasively argued that under the current formulation of the NLRA, the employer's role in constructing the collective agreement exceeds that of the union.[381] Should the union be held responsible for unconstitutional contract terms sponsored by the employer? If not, how are we to separate which party is responsible for an offending term in the give-and-take of collective bargaining?[382] Furthermore, the process of collective bargaining is not analogous to the legislative process. A strike seems a poor analogy to a vote to override a veto, and no legislative analogue exists for an employer's threat to subcontract work or close the plant altogether. Thus, it would seem a mistake to elevate the metaphor of industrial legislation to the level of constitutional doctrine without deeper examination.

If we apply current Supreme Court doctrine to the problem, we find little hope that the union's status as the exclusive representative under section 9(a) would supply the necessary nexus between the state and the union's actions to make them state action. In *Jackson v. Metropolitan Edison Co.*,[383] the Supreme Court held that a state grant of monopoly status to a private utility company did not make the utility's decision to terminate service to customers state action.[384] Similarly, in *San Francisco*

[381] Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1546–47 (1981); *see also* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 676 (1981) (under the NLRA, Congress did not intend to make unions an "equal partner" with the employer in running the business); Schatzki, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?*, 123 U. PA. L. REV. 897, 901–02 (1975).

[382] For example, if the union asks for a grievance procedure, and the employer agrees to such a procedure on condition of a broad no-strike clause prohibiting job actions and demonstrations of any kind, could the no-strike clause be considered a violation of the first amendment perpetrated by the union?

[383] 419 U.S. 345 (1974).

[384] *Id.* at 351–52. Although the Court found some nebulous reasons to doubt the utility's monopoly status, it held that even if the utility did have a grant of pure monopoly, this was not determinative in considering whether the utility's decision to terminate service was state action. *Id.*

Arts & Athletics v. United States Olympic Committee[385] the Court held that the grant of a corporate charter or trademark did not make the actions of the recipients of such grants state action.[386]

One might try to distinguish *Jackson* by arguing that the grant of authority examined in that case is narrower than the grant of authority to a union under section 9(a). Arguably, the provision of gas and electricity has a less intimate effect on people's lives than the determination of their conditions of employment. However, there are some compelling counterarguments. The grant of authority to provide utility service is a powerful one, since a home, under modern conditions, is likely to become uninhabitable if service is denied.[387] The self-help remedy for individuals dissenting from the selection of a public utility is moving to a new town. In general, moving is more burdensome than finding a new job, the self-help remedy for individuals dissenting from the selection of an exclusive representative. Moreover, because of the union's elected status, the nexus between the state and the challenged activity under section 9(a) is weaker than in *Jackson*. Unlike employees under the NLRA, the utility customers in *Jackson* were not allowed to vote directly on the selection or retention of Metropolitan Edison as their public utility. Given the precedent of *Jackson* and the current disposition of the Court to define state action narrowly, it seems doubtful that state action could be established on the basis of the state's grant of exclusive authority under section 9(a).

Nor does current state action doctrine hold much promise for the argument that industrial self-government represents a delegated government function. The government-function argument under section 9(a) is based on an analogy between the process and product of collective bargaining and the process and product of state legislation. However, to determine what is a government function for the purposes of defining state action, the Court looks not at process and product, but instead at the subject matter of the function performed. The activities of a private party performing a function assigned by the state are considered state action only if the party performs a function which is "tra-

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[385] 483 U.S. 522 (1987).

[386] *Id.* at 543–44. *See also* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176–77 (1972) (a private club's discrimination against blacks not state action despite the fact that the state had granted the club one of a limited number of liquor licenses).

[387] *Jackson*, 353 U.S. at 361 (Douglas, J., dissenting).

ditionally the exclusive prerogative of the State."[388] The Supreme Court has also pointed out that "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"[389] Although the state has sometimes passed laws regulating minimum wages, maximum hours, and working conditions,[390] the determination of the terms of employment among private employers and employees has never been its exclusive prerogative. Traditionally, the determination of private terms of employment has been left to the private parties.[391] Thus, under section 9(a) of the NLRA, unions exercise a private function rather than a delegated government function which would constitute state action.[392]

The failure, under existing precedent, of the state action argument based on the union's designation as the exclusive representative is consistent with the state action doctrine's purpose of preserving the Constitution's balance of individual freedom. Certainly an unbounded application of *Jackson*, exempting all authorizations of private power in areas which are not the traditional prerogative of the state, would be wrong. When the state assigns a monopoly to a private party, it substitutes regu-

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[388] Blum v. Yaretsky, 457 U.S. 991, 1005 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157–61 (1978); *Jackson*, 419 U.S. at 353.

[389] *Flagg Bros.*, 436 U.S. at 158.

[390] *E.g.*, Fair Labor Standards Act of 1938, 52 Stat. 1060 (current version codified at 29 U.S.C. §§ 201–19 (1982)) (regulating minimum wage); Occupational Safety and Health Act of 1970, 84 Stat. 1590 (current version codified at 29 U.S.C. §§ 651-78) (regulating workplace safety).

[391] Even if we assume that the union's grant of exclusive bargaining authority under section 9(a) makes the union a state actor, a centuries-old tradition of private determination of the terms of employment in this country preceded the passage of the NLRA. This tradition has continued after the passage of the NLRA in the unorganized bulk of the private sector.

[392] This analysis brings to the forefront what is really the most interesting constitutional question posed by section 9(a), not whether the state's assignment to the union of the private function of bargaining makes the union a state actor, but whether the state *can* reassign the right to bargain from the private employees to the union without infringing upon the employees' first amendment, fifth amendment, or freedom of contract rights. Although the Court has never addressed this issue from the perspective of dissenting employees' constitutional rights, the Court has found no violation of the employer's fifth amendment and freedom of contract rights in the designation of the union as the exclusive representative under section 9(a). NRLB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44–45 (1937); Virginian Ry. Co. v. System Fed'n No. 40, 300 U.S. 515, 557–59 (1937). There have been some lower court opinions upholding the concept of exclusive representation over the constitutional objections of dissenting employees. *See, e.g.*, Local 858 American Fed'n of Teachers v. School Dist. No. 1, 314 F. Supp. 1069 (D. Colo. 1970). *See generally* Zwerdling, *The Liberation of Public Employees: Union Security in the Public Sector*, 17 B.C. INDUS. COM. L. REV. 993, 1001–02 nn.57–58 (1976).

lation for whatever discipline on individual behavior the market might impose. The regulation may increase or decrease the individual freedom of the monopolist or its customers over what the market may provide. Although the results of current or past markets are not constitutionally protected,[393] if the state unilaterally assigned a complete and unfettered monopoly over an aspect of some importance to people's lives, one must wonder whether the Constitution would require that this monopoly be subject to constitutional constraints.[394] On the other hand, almost every law involves some grant of authority to a private party which affects the individual freedom of the party or the people with whom it deals.[395] Unless every law is to create a state actor, some rule or line must be constructed to distinguish when the exercise of a grant of authority to a private party constitutes state action and when it does not. The construction of such a general rule is beyond the scope of this Article. However, I would argue that the union's designation as exclusive representative is not such an extensive grant of authority that the union's acts should be subject to constitutional scrutiny.

The grant of authority to the exclusive representative is far from that of a unilaterally imposed, unfettered monopoly. In fact, one could argue that the union's designation under section 9(a) is not a grant of authority at all. Long before the passage of the NLRA, unions bargained for and received enforceable agreements of employer recognition that they were the employees' exclusive bargaining representatives.[396] At times such recognition was achieved without majority support of the represented employees or after a strike. By enacting the election and exclusive representation provisions of section 9 and by prohibiting recognition strikes in section 8(b)(7), Congress did not create a new status; it created only a fairer and more peaceful

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[393] "[A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State, or of *laissez faire*." Lochner v. New York, 198 U.S. 45, 75 (Holmes, J., dissenting).

[394] For example, if the NLRA required that all employees be represented by worker committees consisting of private employees designated by the government in each shop and that these committees have complete and unilateral power over the setting of wages, hours, and working conditions in the shop, I would think that there would be a good argument that the acts of these worker committees would be state action. Such is not the case under the current NLRA.

[395] For example, in labor law the simple rule that collective agreements are enforceable grants unions authority in their relationships with employers.

[396] S. REP. No. 573, 74th Cong., 1st Sess. 11–12 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2300, 2311–12 (1949).

system for allowing unions to achieve the status of exclusive representative.[397] The election process, in which each employee has an equal say, decreases any grant of authority or state nexus by interjecting the employees' private decision as to whether to select or retain the union as their exclusive representative. Finally, the union's authority as exclusive representative has significant limitations. The union must bargain with the employer to determine the terms of the collective agreement and must work with the employer in its enforcement. The union is also bound in its treatment of the employees and their concerns by its duty of fair representation[398] and by specific limitations in the NLRA and the Labor Management Reporting and Disclosure Act (LMRDA).[399] Far from being unfettered, the union's grant of authority under section 9(a) is carefully confined and constrained to protect dissenting employees' rights.

Similarly, the Court's emphasis on subject matter over process and product in the determination of what is a government function for the purposes of finding state action makes sense in light of the purpose of the state action doctrine of preserving individual liberty. Democratic procedures and bargaining are commonly used by private parties in our society. Partnerships, cooperatives, corporations, associations, and fraternal organizations all use, and sometimes are required by law to use, democratic procedures for making decisions. Bargaining is the predominant mode of exchange in our economy. Moreover, many of the documents produced by these institutions, including charters, by-laws, rules, and contracts, can be analogized to legislation. It would not only unduly impinge the liberty of such parties but also extend the Constitution beyond any reasonable reading to hold that they are subject to constitutional constraints. On the other hand, if the government were allowed to assign its traditional functions without subjecting the performance of those functions to constitutional scrutiny, the Consti-

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[397] *See* DEVELOPING LABOR LAW, supra note 160, at 29, 43, 56–58.

[398] *See, e.g.*, Steele v. Louisville & N.R.R., 323 U.S. 192 (1944) (duty of fair representation); 29 U.S.C. § 158(b) (1982) (union unfair labor practices); 29 U.S.C. § 411 (1982) (union members' "bill of rights"); 29 U.S.C. § 501 (1982) (union officers subject to fiduciary duties). Some may think it ironic that the duty of fair representation, which the Court found implied in section 9(a) to avoid the question of whether the exclusive representative's acts constitute state action, should now be used to argue that the exclusive representative's acts do not constitute state action. Nevertheless, as currently formulated, the duty of fair representation is a significant statutory limitation on the grant of authority to exclusive representatives under section 9(a).

[399] 73 Stat. 519 (codified as amended at 29 U.S.C. §§ 401–531 (1982 & Supp. 1987)).

tution's protection of individual liberty would soon be undermined. The government could merely delegate its functions of conducting elections, tax collection, benefit distribution, and law enforcement to private parties with all of the authority of the government, but with none of its constraints or responsibilities.

C. *State Encouragement of Union Security Agreements*

The second argument in favor of finding state action in the negotiation and observance of agency shop agreements under the NLRA is that section 8(a)(3) and other provisions of the Act encourage collective bargaining and agency shop agreements, and therefore the negotiation of such an agreement is an act attributable to the state. As previously discussed, congressional purposes in enacting the NLRA included promoting collective bargaining and shifting bargaining power to employees.[400] These purposes are reflected in several provisions of the Act. Not only does the ban on unfair labor practices listed in section 8(a) prohibit a variety of employer techniques for discouraging employee organization,[401] but the election procedure of section 9 arguably facilitates such employee organization.[402] Once the employees select a representative, that union is designated under section 9(a) as the exclusive representative for all employees in the unit.[403] The employer is required to bargain in good faith with this exclusive representative over wages, hours, and working conditions, including union security agreements.[404] Union security agreements, including agency shop agreements, are authorized by section 8(a)(3), exempting them from the general prohibition against employer discrimination on the basis of union affiliation.[405] One could argue that if the Act encourages collective bargaining and shifts bargaining power to employees, the predictable result is that unions will achieve more of their

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[400] 29 U.S.C. § 151 (1982); DEVELOPING LABOR LAW, *supra* note 160, at 27–28; Keyserling, *supra* note 220, at 206–08.

[401] 29 U.S.C. § 158(a) (1982).

[402] *See* 29 U.S.C. § 159 (1982). *But see* Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983) (election procedure under NLRA lends itself to employer delay and obstruction).

[403] 29 U.S.C. § 159(a) (1982).

[404] 29 U.S.C. §§ 158(a)(5), (d) (1982).

[405] 29 U.S.C. § 158(a)(3) (1982).

collective bargaining objectives—including agency shop agreements.[406]

This argument is subject to empirical criticism. Although the NLRA's purposes of promoting collective bargaining and shifting bargaining power to employees are well established in the lore of labor law, it is questionable whether these objectives have in fact been achieved by the statute. Professor Weiler has argued persuasively that the lack of adequate penalties for employer unfair labor practices and the protracted election procedures under the NLRA allow employers effectively to discourage employee organization.[407] Comparisons of employee organizing under the NLRA with employee organizing in the public sector and in other countries support this assertion and suggest that employer recalcitrance has contributed significantly to the recent precipitous decline in the percentage of employees organized in the private sector.[408] There is no substantial penalty to enforce the employer's obligation to bargain under the NLRA.[409] Moreover, as Professor Stone has noted, the Supreme Court has weakened the employer's obligation to bargain by excluding such "management decisions" as subcontracting and the introduction of new technology from the range of subjects which the employer must negotiate.[410] Stone argues that this circumscription has lessened unions' bargaining power.[411] Finally, Professor Klare has argued that in interpreting the NLRA the Court has "deradicalized" the statute by emphasizing the congressional purposes consistent with liberal capitalism while

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[406] Brief of Respondents at 8–9, *Beck*, 108 S. Ct. 2641. It is also sometimes argued that Section 8(a)(3) itself encourages the negotiation of union security agreements. *Id.* This argument, however, seems baseless. The language of Section 8(a)(3) merely authorizes union security agreements, it does not encourage or coerce them. 29 U.S.C. § 158(a)(3) (1982). Indeed, before the passage of Section 8(a)(3) all manner of union security agreements both existed and were enforceable, perhaps even by a minority union. Reply Brief of Petitioners at 1–2, *Beck*, 108 S. Ct. 2641. In its current form, Section 8(a)(3) prohibits the closed shop, limits the enforceability of the union shop and conditions the negotiation of a union security agreement on the union's status as the duly elected or recognized exclusive representative. 29 U.S.C. § 158(a)(3) (1982). Thus, by itself, Section 8(a)(3) can be viewed as a limitation on the negotiation of union security agreements.

[407] *See* Weiler, *Striking a New Balance: Freedom of Contract and the Prospects for Union Representation*, 98 HARV. L. REV. 351, 358–62 (1984); Weiler, *supra* note 402, at 787–97.

[408] R. FREEMAN & J. MEDOFF, WHAT DO UNIONS DO? 221 (1984).

[409] *See, e.g.*, Ex-Cell-O Corp., 185 N.L.R.B. 107 (1970) (denying NLRB power to order employer who refused to bargain to compensate employees by the amount they would have received if there had been good faith bargaining).

[410] Stone, *supra* note 381, at 1547–52.

[411] *Id.* at 1557–58.

ignoring Congress's more radical purposes,[412] including the equalization of bargaining power between employees and employers.[413]

The argument that the NLRA encourages agency shop agreements is also subject to criticism on theoretical grounds. It seems clear that encouragement of collective bargaining would encourage, or at least create more opportunities for, the negotiation of agency shop agreements. However, an increase in employees' bargaining power due to the NLRA would not necessarily encourage the negotiation of agency shop agreements. If agency shop agreements are worth more to employees than they cost employers, presumably even a very powerful employer will offer to include such a provision in the collective agreement in exchange for a wage decrease of greater value to him, but of lesser value to the employees than the agency shop agreement. Similarly, if agency shop agreements are worth less to employees than they cost employers, even a very powerful union would agree to omit an agency shop agreement in exchange for a wage increase of greater value to the employees, but less cost to the employer than the agency shop agreement. In other words, whether an agency shop agreement is included in the collective agreement will depend on whether it is an "efficient" contract term, in that its benefits to the employees outweigh its costs to the employer, and not on the respective bargaining power of the parties.[414] At least in a simple economic model, bargaining power is used to determine the division of any economic profits or rents, not to determine the inclusion or exclusion of any specific contract term.[415]

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[412] Klare, *supra* note 220, at 265–70.

[413] *Id.* at 292–93. *See also* First National Maintenance Corp. v. NLRB, 452 U.S. 666, 676 (1981) (congressional purpose was to create system for resolution of conflicts, not to make labor an "equal partner" in the operation of the business).

[414] Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 245–49 (1987); *see also* Coase, *The Problem of Social Cost*, 3 J.L. & ECON 1 (1960).

[415] Schwab, *supra* note 414, at 245–49. There are some subtle but potentially serious shortcomings in this argument. First, it ignores potential wealth effects. That is to say it assumes that as employees' bargaining power and wealth grow, their valuation of an agency shop agreement will remain the same. *See* Regan, *The Problem of Social Cost Revisited*, 15 J.L. & ECON. 427, 432–33 (1972). Whether or not such wealth effects would be important in the case of union security agreements is an empirical question. *See* Schwab, *A Coasean Experiment on Contract Presumptions*, 17 J. LEG. STUD. 237, 265 (1988). The argument also assumes that employers and unions always bargain to an efficient solution analogous to what would prevail in a competitive market. *See* Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CAL. L. REV. 221, 244 (1980); Cooter, *The Cost of Coase*, 11 J. LEG. STUD. 1, 14 (1982). Such an assumption seems a gross simplification of the bargaining relationship between employers and unions.

Once again, if we apply current Supreme Court doctrine to the argument that the NLRA encourages agency shop agreements, we find little hope that the Court would find the necessary nexus to establish state action. State encouragement of a private party's action will cause it to be considered state action only if the state "has exercised coercive power or has provided such significant encouragement, either overt or covert," that the action "must in law be deemed to be that of the State."[416] "Mere [state] approval of or acquiescence in the initiatives of a private party is not sufficient" for a finding of state action.[417] Moreover, during the tenures of the Burger and Rehnquist Courts, the tendency has been to examine the activity in question very narrowly, requiring state coercion or significant encouragement of the specific action or decision.[418] A general argument that the NLRA encourages collective bargaining and shifts bargaining power to employees, resulting in more agency shop agreements, would not prevail under the current doctrine. Instead, one would have to show that the government coerced or significantly encouraged the specific decision by the union and the employer to enter into an agency shop agreement.

It is "the fundamental premise" of the NLRA that the government regulates only the process of collective bargaining,

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[416] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (citing Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 357 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970)). *See also* San Francisco Arts & Athletics v. United States Olympic Comm., 483 U.S. 522, 543–44 (1987); Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).

[417] *Blum*, 457 U.S. at 1004–05, (citing *Flagg Bros.*, 436 U.S. at 164–65; *Jackson*, 419 U.S. at 357 (1974)). *See also San Francisco Arts & Athletics*, 483 U.S. at 543–44.

[418] For example, in Blum v. Yaretsky, 475 U.S. 991 (1982), the Court found that the decisions of committees of private doctors to discharge and transfer Medicare patients were not state action because the actual decisions to discharge and transfer were made by the doctors on the basis of professional standards not established by the state. *Id.* at 1008. No state action was found, despite the fact that the federal government paid for the patients' medical care, regulated their treatment, required nursing homes and hospitals to set up the committees, prescribed the form the committees would use in deciding on discharges and transfers, penalized nursing homes and hospitals if they did not make appropriate decisions in discharges and transfers, reviewed the decisions to discharge or transfer, and reduced payments for services in accordance with the committee decisions. *Id.* at 1006–10. Similarly, in Rendell-Baker v. Kohn, 457 U.S. 830 (1982), the decision of a private school to discharge a teacher was not considered state action because the state did not coerce or significantly encourage the specific decision to fire the teacher. *Id.* at 841. In *Rendell-Baker* the school performed a public function (although not one exclusively performed by the state) and the state sent the students to the school, provided 90% of its funding, and had the right of approval in some hiring. *Id.* at 832–35. *See also San Francisco Arts & Athletics*, 483 U.S. at 543–44; *Flagg Bros.*, 436 U.S. at 166; *Jackson*, 419 U.S. at 357.

leaving the determination of the specific terms of the collective agreement to the private parties.[419] Since the passage of the Wagner Act, both Congress and the courts have understood that the NLRA's obligation to bargain in good faith does not require the parties to make any specific concessions; the Act does not allow the government to supervise the terms of collective agreements.[420] With the passage of the Taft-Hartley Act in 1947, Congress has expressly excepted any obligation to make a concession from the obligation to bargain in good faith.[421] As described by Senator Walsh (D-Mass.), chairman of the Committee on Education and Labor during the enactment of the Wagner Act, the Act "indicates the method and manner in which employees may organize . . . and leads them to the office door of their employer, . . . [but] does not go beyond the office door . . . ."[422] Whatever encouragement for collective bargaining and the promotion of employee interests can be found in the NLRA, it is not used to coerce or significantly encourage the inclusion of any specific term in the collective agreement. Consistent with this approach, section 8(a)(3) merely authorizes the parties to enter into union security agreements, neither requiring nor encouraging them.[423]

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[419] While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to do so would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (footnote omitted). *See also* Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 254 (1974).

[420] The committee wishes to dispel any possible false impression that this bill is designed to compel the making of agreements or to permit governmental supervision of their terms. It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.

S. REP. NO. 573, 74th Cong., 1st Sess. 12 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 117, at 2300, 2312. Similarly, in the first major test of the constitutionality of the NLRA, the Court said:

> The Act does not compel agreements between employers and employees. It does not compel any agreement whatever . . . . The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

[421] 29 U.S.C. § 158(d) (1982).

[422] 79 CONG. REC. 7659 (1935), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, supra note 117, at 2373.

[423] *See supra* notes 406–415 and accompanying text.

The analysis above ignores the fact that in *Railway Employees' Department v. Hanson*,[424] the Supreme Court found that the negotiation of a union security agreement under section 2 Eleventh of the RLA (the RLA provision analogous to section 8(a)(3)) was sufficiently encouraged to constitute state action.[425] However, the Court's finding of state action in that case turned on the exercise of the Supremacy Clause in section 2 Eleventh.[426] The RLA authorizes union security agreements notwithstanding contrary state laws. By pre-empting contrary state laws, the RLA legalizes otherwise unlawful private action and thus is said to give union security agreements the imprimatur of federal law.[427] There is no similar exercise of the Supremacy Clause under the NLRA. Section 14(b) of the Act allows contrary state law to supersede the authorization of union security agreements in section 8(a)(3).[428]

The denial of a finding of state action based on the NLRA's general promotion of collective bargaining and employee interests is consistent with the purpose of the state action doctrine to preserve individual liberty. To allow the state to resort to any form of encouragement or coercion of specific private acts without subjecting them to constitutional scrutiny would undermine the Constitution's check on government power. The government could escape its constitutional limitations merely by coercing powerful private parties to carry out its forbidden objectives.[429] However, it is commonplace for states to pass laws designed to foster a type of private institution or activity with the hope of obtaining certain desired results. General encouragement of this sort is much less subject to abuse by the government. Although I will not construct a general dividing line between these two cases, the encouragement of collective bargaining under the NLRA clearly falls much closer to the latter case than to the former. Moreover, the level of government encouragement under the NLRA is well below the level of encouragement that has been tolerated in other instances. For example, the government has undertaken extensive efforts to foster private enter-

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[424] 351 U.S. 225 (1956).
[425] *Id.* at 232.
[426] *Id.*
[427] *See id.*; *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 218 n.12 (1987).
[428] 29 U.S.C. § 164(b) (1982).
[429] For example, the state might silence a dissenting author by offering great rewards or punishments to private publishers according to their refusal or agreement to publish the author's work.

prise in hopes of promoting economic well-being. Incorporation laws, partnership laws, tax laws, government loans and grants, and even our conceptions of private property and theft are all arguably designed to protect and support private enterprise and economic growth.[430] The government's efforts to foster employee organization and collective bargaining in hopes of promoting employee interests and industrial peace pale by comparison. If the Court were to find that collective bargaining and its results are attributable to the state, it would also have to consider whether a vast portion of private enterprise and its results are attributable to the state.[431]

What seems at odds with the purpose of the state action doctrine is the Supreme Court's holding in *Hanson*. In section 2 Eleventh of the RLA, Congress exempted union security agreements from a general prohibition against employer discrimination on the basis of union affiliation. Thus, Congress decided not to prohibit this type of conduct. Moreover, because section 2 Eleventh pre-empted contrary state laws, Congress decided that states would not prohibit such conduct. It seems curious that a decision *not* to regulate an area of private activity gives rise to a finding of state action. By finding state action this way, the Court interjects constitutional standards that restrict the private parties' individual freedom which are "uninvited" by affirmative legislation.[432] The fact that Congress exercised the Supremacy Clause in its decision not to prohibit union security agreements seems irrelevant to the determination of whether there is state action. The Supremacy Clause was fashioned to cope with problems entirely unrelated to the question of when

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[430] *See, e.g.*, R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 1.1 (1984) (property is a legally protected expectation of deriving enjoyment from a thing); R. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1 (3d ed. 1986) (creation of exclusive property rights is a necessary condition for the efficient use of resources); Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 363–65 (1954) (discussion of property as an allocation of wealth).

[431] There have been commentators who believe corporations should be subject to constitutional constraints. *See, e.g.*, A. MILLER, THE MODERN CORPORATE STATE 182–87 (1976); Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 933–34, 942 (1952); Latham, *The Commonwealth of the Corporation*, 55 NW. U.L. REV. 25, 25–29 (1960). There have also been commentators who disagree. Manning, *Corporate Power and Individual Freedom: Some General Analysis and Particular Reservations*, 55 NW. U.L. REV. 38, 38–54 (1960); Marshall, *supra* note 30, at 569–70.

[432] The fact that this constitutional interjection is "uninvited" by statutory regulation suggests that *Hanson* violates the second purpose of the state action doctrine—preserving federalism and the separation of state and federal powers. *See supra* note 348 and accompanying text.

constitutional restraints should apply to private actions. Indeed, I know of no other case in which the Court has made a similar finding. Confusion of the Supremacy Clause with the state action doctrine can yield ridiculous results. Professor Wellington has suggested that the logic of *Hanson* requires that if Congress legislates to pre-empt state law in a given area, it must affirmatively outlaw all private behavior contrary to the Constitution.[433]

Holding that a union's negotiation and observance of a collective agreement is state action would result in a radical change in our conception of unions under the NLRA. Unions are currently viewed by both the Court and Congress as *private* centers of employee power under the NLRA.[434] Although existing limitations on unions already subject them to constraints similar to those contained in the Constitution,[435] a change in the status of unions from private to state actors would fundamentally affect our labor law and the current conduct of industrial relations. All of a union's actions in the negotiation and enforcement of the collective agreement would be subject to constitutional scrutiny. Would the negotiation of a grievance arbitration procedure in place of the right to litigate contract violations violate employees' seventh amendment rights?[436] The substitution of such

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[433] Wellington, *supra* note 57, at 356–57.

[434] "[T]he fundamental premise on which the [NLRA] . . . is based [is] . . . *private* bargaining under government supervision of the procedure alone, without any official compulsion over the actual terms of the contract." H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (emphasis added).

[435] For example, the duty of fair representation and the employee's "bill of rights" in the LMRDA, 73 Stat. 519 (codified at 29 U.S.C. §§ 401–531) (1982).

[436] Under current labor law, arbitration of contract disputes is favored over litigation because the parties, who are considered private actors, have voluntarily chosen the arbitrator to be an official interpreter of their contract. United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580–82 (1960). If the union were viewed as a state actor, the typical contract grievance procedure most likely would be considered to violate the grievant's seventh amendment right to a trial by jury. While the state may establish a compulsory non-jury forum for litigation, it must provide a right to trial *de novo* before a jury to avoid seventh amendment invalidity. *See, e.g.*, Capital Traction Co. v. Hof, 174 U.S. 1 (1898) (upholding statute requiring trial before justice of the peace, with appeal to jury trial before court of record); Woods v. Holy Cross Hosp., 591 F.2d 1164 (5th Cir. 1979) (upholding Florida statute requiring referral of malpractice claims to nonbinding "mediation panel"); Kimbrough v. Holiday Inn of Lionville, Inc., 478 F. Supp. 566 (E.D. Pa. 1979) (upholding local rule establishing compulsory nonbinding arbitration). Because the typical grievance arbitration is subject only to limited review, there would be serious seventh amendment problems if the union were considered a state actor. *But see* Keith Fulton & Sons, Inc., v. New England Teamsters and Trucking Indus. Pension Fund, 762 F.2d 1124 (1st Cir. 1984) (compulsory arbitration under Multiemployer Pension Plan Amendments Act not invalid under seventh amendment because Congress may commit enforcement of new public rights to alternative tribunals such as an administrative agency).

grievance arbitration procedures for court procedures in the settlement of contract disputes has been recognized as one of the primary achievements of collective bargaining.[437] It is a cornerstone in the current conduct of labor relations. Finally, a change in the status of unions would result in a fundamental change in the way we make national labor policy. If unions are viewed as state actors, power over our federal labor policy would shift from Congress to the courts.[438] The courts are ill-suited for this task, due to their lack of expertise in the area of labor relations and lack of political mandate to make policy decisions.[439]

V. CONCLUSION

The Court's interpretation of section 8(a)(3) of the NLRA in *Beck* cannot be justified by recourse to the usual intrinsic and extrinsic resources for statutory interpretation. The words, administrative interpretations, and legislative history of the statute all indicate that Congress intended to allow agency shop agreements under section 8(a)(3) and intended purposes for union security agreements beyond the mere recoupment of collective bargaining expenses.

Nor can the Court's interpretation be justified by recourse to the Court's prior interpretations of section 2 Eleventh of the RLA or to the doctrine of avoiding constitutional questions. The Court's interpretation of section 2 Eleventh was affected by its desire to avoid the question of whether the negotiation and observance of agency shop agreements under the RLA violated dissenting employees' constitutional rights. Regardless of whether the Court's constitutionally colored interpretation of section 2 Eleventh was appropriate, *Beck* is an inappropriate case for application of the doctrine of avoiding constitutional questions. There is no serious question of the constitutionality of agency shop agreements to avoid in *Beck*, and the Court's

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[437] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549–50 (1964); L. HILL & C. HOOK, MANAGEMENT OF THE BARGAINING TABLE 199 (1945). *See generally* N. CHAMBERLAIN & J. KUHN, COLLECTIVE BARGAINING 138–65 (3d ed. 1986); S. SLECHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 692–738 (1960).

[438] Wellington, *supra* note 57, at 361.

[439] *Id.* at. 361–64.

interpretation of section 8(a)(3) is not supported by the rationales of the doctrine.

An examination of the constitutional question avoided in *Beck* discloses that there is no state action to support the claim that negotiation and observance of agency shop agreements under the NLRA violate dissenting employees' first amendment rights. Under the Court's current formulation of the state action doctrine, there is insufficient grant of authority to the union as exclusive representative and insufficient encouragement of the negotiation of union security agreements for the negotiation and observance of such agreements to constitute state action. Indeed, it is well established in American labor law that the parties to the collective agreement, not the government, determine the provisions of that agreement. The determination that there is no state action in the negotiation and observance of union security agreements is consistent with the purpose of preserving individual freedom represented in the state action doctrine. If constitutional scrutiny were extended to the negotiation and observance of union security agreements, it would logically extend to a host of other activities now considered private and not subject to constitutional constraints.

The Court's opinion in *Beck* amounts to judicial legislation with no basis in the statute or the Constitution. If the Court had properly performed its traditional role as statutory and constitutional umpire, it would have interpreted section 8(a)(3) to allow the negotiation and observance of agency shop agreements and would have determined that such agreements do not violate dissenting employees' first amendment rights. Instead, because of its failure to acknowledge the effect of past constitutional concerns on its interpretation of section 2 Eleventh and to consider whether constitutional concerns required a similar result in interpreting section 8(a)(3), the Court abandoned its traditional role and usurped the legislature's role by specifying both the policy and form of section 8(a)(3). The *Beck* decision limits the enforceability of agency shop agreements in collective bargaining agreements covering over six million workers and opens a potentially significant drain on the resources of the national labor movement through bookkeeping and litigation expenses required to resolve complaints of dissenters. One can only hope that the mistakes of the *Beck* decision will not be repeated.